AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 157.

WOLFE LONDONER AND DENNIS SHEEDY, PLAINTIFFS IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER, AS SUCCESSOR TO THE CITY OF DENVER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

TRANSCRIPT OF RECORD FILED NOVEMBER 19, 1906.
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1 No. 157, October Term, 1907.

In the Supreme Court of the United States of America.

WOLFE LONDONER and DENNIS SHEEDY, Plaintiffs in Error,
vs.
CITY AND COUNTY OF DENVER (Substituted as Successor to The City of Denver) and W. J. FINE, as Treasurer of the City and County of Denver (Substituted as Successor to Charles S. Elder, as County Treasurer of Arapahoe County, Colorado, and *ex Officio* Collector of the City of Denver), Defendants in Error.

On April 2, 1900, the above named Plaintiffs in Error, as Plaintiffs, filed in the District Court of the Second Judicial District of the State of Colorado, their complaint in writing, which complaint was and is in words and figures as follow*ing*, to wit:

No. 31380.

WOLFE LONDONER and DENNIS SHEEDY, Plaintiffs,
vs.
THE CITY OF DENVER, a Municipal Corporation, and CHARLES S. ELDER as County Treasurer of Arapahoe County, Colorado, and *ex Officio* Collector of The City of Denver, Defendants.

The plaintiffs, by Joshua Grozier their attorney, bring this their bill of complaint on behalf of themselves and all other persons and parties similarly situated and interested who shall come in and bear their share of the costs and expenses of this suit and be made parties plaintiff herein; and allege that the defendant The City of Denver at all times herein mentioned was and is a municipal corporation existing under special charter made a public act of the Council and House of Representatives of the then Territory of Colorado and various amendatory public acts enacted by the Territorial legislatures of the State of Colorado and the General Assembly of the State of Colorado; that the defendant Charles S. Elder is the duly elected, qualified and acting County Treasurer of Arapahoe County, Colorado, and *ex-officio* Collector of the defendant The City of Denver; and further that the question involved herein is one of common and general interest to a large number of persons, and that it is impracticable to bring all before the Court, and that the plaintiffs sue now as well for the benefit of all such persons and parties similarly situated and interested who shall come in and bear their share of the attorney fees, costs and expenses of this suit, as for themselves.

"That on or about May 24, 1897, there was presented to the Board of Public Works a certain petition in the following words: 'To the Honorable Board of Public Works and City Council of the City of Denver: The undersigned, your petitioners, owners of the frontage of lots and tracts of land described opposite their respective names, hereby, in pursuance of the charter of the City of Denver, passed

by the 9th General Assembly of the State of Colorado, respectively petition your honorable bodies for the grading, paving, and curbing of 8th avenue, from the east property line of Sherman avenue to the west property line — Lafayette street, including all intersections lying within said district in the city of Denver. The wearing surface of said pavement to be that known as Trinidad Lake asphalt, obtained from the asphalt lake owned by the government in the Island of Trinidad; or Bermudez Lake asphalt, obtained from the asphalt lake in the province of Bermudez, republic of Venezuela; or Grizzly asphalt, obtained from the mines and refineries of the Pacific Asphalt Company in Santa Barbara county, California. We request that a four inch concrete foundation and a two inch wearing surface be required. That you require a five year guarantee, ordering the work on the ten installment plan; and that no contract be let for
2 the paving to be done under this petition at a price exceeding $2.35 per square yard. And we will ever pray.'

"That the said petition was not signed by the plaintiffs, or any of them, or the owner of any of their property hereinafter mentioned in said so-called district. That before said board or city made any advertisement or let any contract for the work, or took any action on or made any finding as to whether or not said petition was a majority petition, the owners of more than sufficient of the property who had originally signed said petition to reduce said petition to a minority petition (if it was ever otherwise, which these plaintiffs allege it was not), in writing notified said board that they desired to and did withdraw from said petition, and said so-called petition thereupon became and was null and void, if, indeed, it had ever been valid."

Plaintiffs allege that on or about January 18th, A. D. 1898 a certain petition was addressed to and filed with the Board of Public Works, so-called, of the defendant city, petitioning as follows:

"First. To create a paving district of, and order the grading, curbing, paving and necessary appurtenances thereto of the following street or streets:

Eighth Avenue from Sherman Avenue to Lafayette Street, in the City of Denver, including all unpaved street and alley intersections in the paving district so created.

Second. To use for the wearing surface of such pavement sheet asphaltum made from one of the following three designated materials: Trinidad Lake Asphalt, obtained from the pitch or asphalt lake in the Island of Trinidad; Pacific Asphalt Paving Cement, obtained from the mines or refineries of the Pacific Asphalt Paving Company, in Santa Barbara County, California; or Alcatraz Asphalt, obtained from the mines and refineries of the Alcatraz Company, in Santa Barbara County, California.

Third. We designate as the particular material for the wearing surface that one of the above named three asphalts upon which you receive the lowest bid, in dollars and cents from a reliable and responsible bidder.

Fourth. That you require a five year guarantee, and that the work be ordered on the ten year installment plan.

Fifth. That you refuse to award any contract for said paving upon any bid which names a price exceeding One Dollar and Ninety-eight cents ($1.98) per square yard for a pavement composed of concrete six inches thick, a binder three quarters of an inch thick and asphalt two inches thick."

which said petition was, as plaintiffs are informed and believe, and so allege, signed by certain of the property owners in the said so-called Eighth Avenue Paving District No. 1 which was thereafter attempted to be created, but these plaintiffs allege that the same was not signed by the owners of a majority of the frontage to be assessed; plaintiffs further allege that when said petition was signed and presented many of the parties whose names appeared thereon were not the owners of the lots appearing thereon opposite their names; plaintiffs further allege that before the publication of the notices as to the time when said Board would consider the ordering of the improvements and before the creation of the said district a large portion of the owners of the frontage, lots and lands to be assessed, who had in the first instance signed said petitions, withdrew their names and their said property, for which they had so signed, from the said petition, which said withdrawals were in writing and duly filed with the said Board, and said Board notified thereof long before the publication of said notices of the attempted creation of the said district and long before the ordering of any of the said improvements or the letting of the contract for the same or the beginning of work on the said contract.

These plaintiffs allege that the said petition above mentioned was the only petition then or since before the said Board asking for paving in said so-called district and that all the acts and doings of the defendant herein alleged were and could have been based on the said petition and none other.

That these plaintiffs did not nor did any of them or the owners of any of the property hereinafter mentioned, which it is attempted to assess, sign the said petition, and did not nor did any of them or the owners of any of said property present to the said Board or City any petition for paving or other improvements in said so-called paving district, and particularly did not petition for paving in said district with what is known as Bermudez Asphalt; and these plaintiffs particularly allege that at all times herein mentioned they were and are severally and respectively opposed to paving with Bermudez Asphalt.

Plaintiffs further allege upon their information and belief that at all times a great majority of the owners of the frontage assessed in said so-called district were and are opposed to Bermudez Asphalt, and were also opposed to any pavement being laid in said so-called district for which the property in the district would be assessed.

That on and prior to January 18th, 1898, protests, objections and remonstrances, both written and oral, against the paving under said petition came to said Board from a large number of the property owners in the proposed district, and, as plaintiffs are informed and believe, written remonstrances against said paving subscribed by the owners of more than a majority of the frontage to be assessed were duly filed with said Board.

3 That notwithstanding said petition was presented on January 18th, A. D. 1898, nothing was done in the matter of said improvements and no step taken toward ordering or considering the ordering of the same until the publication of the notice next hereinafter mentioned; that in the mean time, between the receipt of the petition and the time of the publication of the last mentioned notice, a great deal of the property which was on the said petition in the so-called district was sold by the owners thereof and the deeds therefor duly recorded in the Recorder's office of Arapahoe County, Colorado, conveying said property to other parties who had not signed said petition.

That notwithstanding the matters and things aforesaid and that no petition for Bermudez Asphalt was then or since before the Board, and notwithstanding that no petition was before the Board signed by a majority of the owners of the frontage to be assessed containing the names of the four asphalts next herein set forth, there was published in the Denver Times on April 7th, A. D. 1899, a so-called notice, which was as follows:

Notice.

Office of the Board of Public Works of the City of Denver.

April 6th, A. D. 1899.

To the owners of all the lots and lands to their full depth, not exceeding one hundred and fifty (150) feet, abutting on each side of Eighth Avenue, from the East property line of Sherman Avenue to the West property line of Lafayette Street, in the City of Denver; and to the owners of all the frontage on all the intersecting streets within a distance of one-half block in each direction from each intersection of the above named Avenue between said limits:

You are hereby notified that petitions for the grading, curbing and paving of Eighth Avenue from the East property line of Sherman Avenue to the West property line of Lafayette Street in the City of Denver; including all unpaved street and alley intersections in the paving district so created; said paving to be upon concrete base upon which shall be a two-inch wearing surface, of Trinidad Lake asphalt, obtained from the asphalt lake owned by the Government in the Island of Trinida-; or Grizzly asphalt obtained from the mines and refineries of the Pacific Asphalt Company in Santa Barbara County, California; or Bermudez Lake Asphalt, obtained from the asphalt lake in the Province of Bermudez, Republic of Venezuela; or of Alcatraz Asphalt, obtained from the mines and refineries of the Alcatraz Company in Santa Barbara County, California; with a guarantee for the maintenance of said improvements for five years; with the privilege of paying therefor in ten annual installments; have been presented to and are now on file in the office of the Board of Public Works of the City of Denver; that said petitions are subscribed by the owners of a majority of the frontage to be assessed for said improvements as by the City Charter required.

That said Board has adopted full details and specifications for said improvements, the same providing for sandstone curbing, and a sheet asphalt wearing surface of Trinidad Lake asphalt, obtained from the asphalt lake owned by the Government in the Island of Trinidad; or Grizzly asphalt obtained from the mines and refineries of the Pacific Asphalt Company in Santa Barbara County, California; or Bermudez Lake asphalt, obtained from the asphalt lake in the Province of Bermudez, Republic of Venezuela; or of Alcatraz asphalt obtained from the mines and refineries of the Alcatraz Company of Santa Barbara County, California; the same to be laid on concrete foundations.

That the probable cost of said improvements, as shown by the estimates of the engineer of said Board, is the sum of Fifty-six thousand, fifty dollars and eighty-seven cents ($56,050.87).

That the cost per front foot of the real estate fronting on the avenue so improved will amount approximately to not exceeding the sum of eight dollars, thirty and three-tenths cents ($8.30 3 10) between the limits above specified; nor the sum of one dollar, twelve and seven-tenths cents ($1.12 7 10) per front foot of all the real estate fronting on the intersecting streets within a distance of one-half block in each direction from each intersection on the avenue to be so improved within said limits.

That the cost of said improvements will be payable within thirty (30) days of the passage of the assessing ordinance for said improvements, or, at the election of the owners of the property to be assessed may be paid in ten (10) equal annual installments, the first of which installments will in such case be due and payable upon the next succeeding date after the passage of the assessing ordinance upon which general taxes or the first installment thereof are by the laws of this state made payable, and the remainder of said installments on the same day in each succeeding year thereafter until the payment of the whole of said principal. That all unpaid installments will bear interest payable annually at the rate of six (6) per cent. per annum until the same are due, and will bear interest after maturity at the rate of one (1) per cent. per month, or fraction of a month, until paid.

4 That the district of lands to be assessed for said improvements is to be known as "Eighth Avenue Paving District Number One of the City of Denver," and will consist of all the lots and lands to their full depth, not exceeding one hundred and 50 (150) feet, abutting on each side of Eighth Avenue from the East property line of Sherman Avenue to the West property line of Lafayette Street; and of all the real estate fronting on the intersecting streets within a distance of one-half block in each direction from each intersection, within the limits above described, of the avenue so to be improved. That the Board proposes to limit the price to be paid per square yard of asphalt pavement, hereunder, to One dollar and ninety-eight cents ($1.98).

That said board is considering said petitions and the advisability of ordering said improvements, and that at or after the hour of 11 o'clock a. m., of Monday, the 8th day of May, A. D. 1899, a resolu-

tion ordering said improvements in acordance with said details, specifications and estimates, and with this notice, will be considered by said board.

That said map and estimates, and all resolutions and proceedings of said board in the premises are on file and can be seen and examined at the office of said board during business hours at any time until 11 o'clock A. M. of said 8th day of May, A. D. 1899, by any person interested, and that all complaints or objections that may be made in writing by any person interested and filed with said board before said last named date, will be heard and determined by said board before final action on said resolution.

S. N. WOOD,
President of the Board of Public Works of the City of Denver.

First publication in The Denver Republican, April 7th, A. D. 1899. Last publication, April 27th, A. D. 1899.

That at the time of the publication of the "Notice objections and remonstrances, both written and oral, against the paving under said petitions came to said Board from a large number of the property owners in the proposed district, and, as plaintiffs are informed and believe, written remonstrances against said paving subscribed by the owners of more than a majority of the frontage to be assessed were duly filed with said Board.

Plaintiffs are informed and believe that a similar advertisement was also published in the Denver Republican of April 7th, A. D. 1899, and that each of said advertisements were published in each copy of said papers to and including April 27th, A. D. 1899, but the same was not published at any other time, in any other paper or papers, or in any other manner whatsoever. That said pretended notices were not nor were either of them in manner, form or substance such a notice as is required by sub-section "second" of section 3 of Article 7 of the City Charter of the City of Denver; that said advertisements did not nor did either of them state that all complaints and objections that may be made in writing concerning the proposed improvements by the owner of any real estate to be assessed will be heard and determined by the Board before final action of the Board thereon, but, contrary to the provisions of the said sub-section confined the complaints and objections that would be acted upon by the said Board to the complaints and objections that might be "filed with said Board"; and contrary to and against the plain provisions of said subsection "second" and in conflict therewith restricted the making of complaints and objections to a time previous to May 8th, A. D. 1899; that May 7th, 1899, was a Sunday; that the first publication of said advertisement was on April 7th, A. D. 1899, and 11 o'clock A. M. on Monday, the 8th day of May, 1899, was in the said notice stated as the time when a resolution ordering said improvements would be considered by the Board; and by the said notice the time when the resolutions and proceedings of the Board could be seen and examined was restricted to any time until and not after 11 o'clock A. M. of said May 8th, 1899, and under the said notice the

persons interested did not have thirty days within which to see and examine all resolutions or proceedings of the Board in said so-called district; that under the said notice the last day on which complaints and objections could be filed (May 7th being a Sunday, when there were no business hours) was Saturday, May 6th, A. D. 1899; that said defect was and is jurisdictional and the city never acquired jurisdiction to do the said work at the expense of any of the property in the district, and particularly did not acquire such jurisdiction to do any of the work or assess any of the cost thereof upon any of the property of plaintiffs herein, none of whom petitioned for the said improvements; that under the laws of the State of Colorado time is

"computed by excluding the first day and including the last; If the last day be a Sunday or a legal holiday it shall also be excluded."

That said notice was further defective in not sufficiently showing the character of the said improvements contemplated to be ordered; that the details and specifications which had been theretofore adopted by the Board provided for excavation cut and filled on the surface of the roadway and provided for granite curbing, no mention of either of which was made in the said notice describing the kind of improvement proposed.

"That said notice was further defective and did not describe the kind of improvements proposed, the kind, character, height, thickness or dimensions of the curbing or the locality where the same would be laid, and did not describe the thickness of the concrete upon which the asphalt pavement was to be laid, or the kind or character of the concrete. That there are various kinds and qualities of concrete materially differing in cost and value, and there are various kinds and qualities of curbing, which differ materially in character, cost and value."

That at all times in the complaint mentioned the name of the owner of each lot, tract or parcel of land which would thereafter be assessed was well known to each of the defendants and each of their servants, officers, agents and employes, and to each of the Officials of Arapahoe County, Colorado, and was particularly well known to each member of the said Board of Public Works; that the cost of searching the Records of Arapahoe County, Colorado, for the purpose of learning the names of such owners was charged up to and included in the alleged cost for which the property is assessed; that nevertheless said notice did not contain the names of the owners of the real estate in said alleged district, and no notice was given to the owners of the real estate in said alleged district or any of them as in said subsection "second", or otherwise; that the said notice did not properly describe the rate of interest on unpaid installments in that the said notice stated that the same "will bear interest after maturity at the rate of one per cent. per month or fraction of a month until paid", which, under the law, is untrue. That said notices were not nor were either of them notices given by the Board of Public Works and did not on their face purport to be notices given by the Board of public works, but were and are notices of one S. N. Wood.

That notwithstanding the matters and things aforesaid the Board of Public Works on May 8th, A. D. 1899, adopted a resolution which was and is in words and figures as follows:—

"Whereas, by resolution of this Board passed on the 10th of December, 1897, this Board adopted full details and specifications for the grading, curbing, paving and otherwise improving of Eighth Avenue from the east property line of Sherman Avenue to the west property line of Lafayette Street in the City of Denver (which
6 said details and specifications were amended by a resolution of said Board passed on the 18th of March, 1899, providing for sandstone curbing and a two inch wearing surface for said paving to be composed of best quality of Trinidad Lake Asphalt obtained from the asphalt lake owned by the government in the Island of Trinidad; or Grizzly Asphalt obtained from the mines or refineries of the Pacific Asphalt Company in Santa Barbara County, California; or Bermudez Asphalt obtained from the lake in the Province of Bermudez, Republic of Venezuela; or Alcatraz Asphalt obtained from the mines of the Alcatraz Asphalt Company in Santa Barbara County, California; together with concrete foundation and a guarantee for the maintenance of said improvements for a period of five years, and also approving of said paving providing that said paving, including said concrete foundations, should cost not exceeding $1.98 per square yard), and

Whereas, in pursuance of said resolution this Board has advertised for twenty days in two daily newspapers of general circulation of the City of Denver, to-wit, The Denver Republican and The Denver Times, therein giving notice to the owners of said real estate in said district to be assessed for the same, of the kind of improvements, the number of installments and the time in which the cost of said improvements would be payable, the rate of interest on unpaid installments, the extent of the district to be assessed, the probable cost as shown by the estimate of the engineer of this Board, and the time, to-wit, Monday, May 8th, 1899, the same being more than thirty days after the first publication of the said notice (the first publication thereof being April 7th, 1899) when a resolution ordering said improvements would be considered by this Board, and this Board having fully complied with the City Charter in regard to said notice; and

Whereas, prior to the passage of said resolution certain petitions were first presented to this Board, subscribed by the owners of a majority of the frontage to be assessed for said improvements; and

Whereas, no remonstrance against the making of said improvements has been filed with the secretary of this Board subscribed by the owners of a majority of the frontage to be assessed therefor, and all complaints and objections made in writing concerning said improvements by the persons interested having been heard and determined by this Board, and upon consideration of the premises this Board is of the opinion that said improvements should be constructed in accordance with said details and specifications.

Therefore, be it Resolved by the Board of Public Works of the City of Denver that the grading, paving, curbing and otherwise im-

proving of Eighth Avenue from the east property line of Sherman Avenue to the west property line of Lafayette Street of the City of Denver in accordance with said details and specifications are hereby ordered, and this Board hereby recommends to the honorable City Council that said improvements be authorized by ordinance in the form of a bill for an ordinance now exhibited to this Board which the president of this Board is hereby directed to authorize by his signature as such president."

That at the time of the adoption of said resolution said City did not have nor has it now jurisdiction, right, power or authority
7 to order or construct improvements of the character referred to in the said notices above herein mentioned, or the character mentioned and described in pretended ordinance No. 57 of the series of 1899 hereinafter mentioned by which said district was pretended to be created, and assess the cost or any part or portion of the same on any of the property in the said so-called assessing ordinance hereinafter in this complaint set forth, but wholly lacked jurisdiction, right or authority so to do.

Plaintiffs further show that though claiming to be acting under the powers given and conferred by the said charter said defendant did not comply with the same in that the so-called Board of Public Works did not before ordering the said improvements adopt full details and specifications for the same, permitting and encouraging competition, determining the number of installments and time in which the cost would be payable, the rate of interest on unpaid installments, the district of lands to be assessed for the same; all of which was and is required by subsection first of section three of article seven of the said city charter.

Plaintiffs further allege that if the said Board ever adopted any details or specifications or the engineer ever prepared any details or specifications the same were prepared and adopted, if at all, on December 10th, 1897, before the presentation of the said petition above herein mentioned, and were not full details or full specifications and were based on a cost per square yard greater than said Board under the said petition last mentioned or otherwise had any authority or right to authorize; and were based on contemplated improvements of more expensive material and material of a different character, grade and cost from the material called for in the said petition and were prepared and adopted before the passage of a certain ordinance known as

"A bill for an ordinance changing the grade elevations of Eighth Avenue from Broadway to Franklin Street; Ninth and Tenth Avenues from Broadway to Congress Park; Lincoln, Sherman, Grant, Logan and Pennsylvania Avenues; Pearl Street, Washington Avenue, Clarkson, Emerson, Ogden and Corona Streets; Downing Avenue, and Marion, Lafayette and Humboldt Streets from Eleventh Avenue to Seventh Avenue.",

known as ordinance No. 26 of the series of 1898, and before the pasage of so-called ordinance No. 94 of the series of 1899, being

"A bill for an ordinance changing the official grades of both sides of the center line of Eighth Avenue from the west line of Sherman

Avenue to the west line of Logan Avenue and the intersecting Avenues in the City of Denver."

That if the engineer of the said Board made any map of the district of the same, the same was made and adopted by the Board, if at all, before the presentation of the petition above mentioned, and at a time more then eighteen months prior to the ordering of the paving or other alleged improvements and at a time when the ordering of an entirely different character of improvements was being considered by the Board; that at the time of the ordering of the said improvements there was not before the said Board any petition authorizing the improvements ordered; that if any estimate of the cost of the improvements was made by the engineer, the same was merely arbitrary and not based or figured on the cost of materials or labor or consideration of the amount or cost or character of grading, cutting or filling, or changes of grading, and was not in detail and was arbitrary and guess work merely.

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Plaintiffs further allege that no ordinance authorizing any paving or other improvements in said so-called Eighth Avenue Paving District is or ever has been in existence; that nevertheless said defendant city claims as its sole and only justification for its acts and doings hereinafter mentioned to be acting under and to derive its powers and authority solely from a pretended ordinance which is in fact no ordinance at all and is not and never was in force, but which said City claims to be ordinance No. 57 of the series of 1899, which was and is in words and figures as follows:

By Authority.

Ordinance No. 57, Series of 1899.

Supervisors' Bill No. 22, Introduced by Supervisor Canon.

A Bill for An Ordinance Creating Eighth Avenue Paving District Number One of the City of Denver and Authorizing the Grading, Curbing, Paving and Otherwise Improving of Eigth Avenue From the East Property Line of Sherman Avenue to the West Property Line of Lafayette Street.

Be it Enacted by the City Council of the City of Denver:

SECTION 1. Whereas, By resolution passed on the 10th day of December, A. D. 1897, and a further resolution, passed on the 18th day of March, A. D. 1898, the Board of Public Works of the city of Denver adopted full details and specifications for the grading, curbing, paving and otherwise improving of Eighth avenue, from the east property line of Sherman avenue to the west property line of Lafayette street, in the city of Denver, therein providing for sandstone curbing and a two-inch wearing surface for said paving of the best quality of Trinidad Lake asphalt, obtained from the asphalt lake owned by the government in the Island of Trinidad; or Grizzly asphalt, obtained from the mines and refineries of the Pacific Asphalt Company, in Santa Barbara county, California, or Bermudez Lake

asphalt, obtained from the asphalt lake in the province of Bermudez, Republic of Venezuela; or Alcatraz asphalt obtained from the mines and refineries of the Alcatraz Company, in Santa Barbara county, California; together with concrete foundations for said paving, and a guaranty for the maintenance of said improvements for the period of five (5) years; and also providing that said paving, including said concrete foundations, should not cost to exceed one dollar and ninety-eight cents ($1.98) per square yard. Said board in said resolutions also determined the number of installments, and time in which the cost of said improvements should be payable, the rate of interest on unpaid installments, the extent of the district lands to be assessed for said improvements, being the same district hereinafter described; and also approved the map and estimate of the engineer of said board relating to said district, said estimate showing the approximate amounts to be assessed upon each piece of real estate in said district, by which it appears that the probable total cost of said improvements is the sum of fifty-six thousand and fifty dollars and eighty-seven cents ($56,050.87); that the cost per front foot of the real estate fronting on the said Eighth avenue will amount approximately to not exceeding eight dollars and thirty and three-tenths cents ($8.33 3/10), between the said limits; nor the sum of one dollar and twelve and seven-tenths cents ($1.12 7/10) per front foot of all the real estate frontage on the intersecting streets, within a distance of one-half block in each direction from each intersection on the avenue to be so improved within said limits; said cost being exclusive of interest and costs of collection; and

Whereas, Prior to the passage of said resolution certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the city charter required; and

Whereas, Said board by advertisement for twenty (20) days in two (2) daily newspapers of general circulation published in the city of Denver, to wit: The Denver Republican and The Denver Times, has given notice to the owners of the real estate in said district of the kind of improvements proposed, the number of installments and time in which the cost will be payable, the rate of interest on deferred installments, the extent of the district to be assessed, the probable cost as shown by the estimate of said engineer, and the time, to wit: the 8th day of May, A. D. 1899, at 11 o'clock a. m., the same being thirty (30) days after the first publication of said advertisement, (the first publication thereof being on April 7th, A. D. 1899), when a resolution ordering said improvements would
9 be considered by said board, and that said maps and estimates, and all resolutions and proceedings of said board in the premises were on file and could be seen and examined at the office of said board, during business hours, at any time until 11 o'clock a. m. on said 8th day of May, A. D. 1899, by any person interested, and that all complaints and objections that might be made in writing by any person interested and filed with said board before said last named date, concerning said proposed improvements,

would be heard and determined by said board before final action on said resolution; and

Whereas, All complaints and objections, so made as aforesaid, have been heard and determined by said board; and

Whereas, By resolution adopted on the said 8th day of May, A. D. 1899, said board, upon consideration of the premises, ordered said improvements to be constructed in accordance with said details and specifications, and recommended to the City Council the passage of an ordinance creating said paving district and authorizing said improvements therein.

SEC. 2. That upon consideration of the premises the city council doth find that in their action and proceedings in relation to said Eighth Avenue Paving District Number One the said board of public works has fully complied with the requirements of the city charter relating thereto.

SEC. 3. The construction of said improvements, to wit: the grading, curbing, paving and otherwise improving of said Eighth Avenue, from the east property line of Sherman avenue to the west property line of Lafayette street, in the city of Denver, be and the same are hereby authorized, to be constructed strictly in accordance with said details and specifications, and the cost thereof not to exceed the estimate of the engineer of said board, to wit: the sum of fifty-six thousand and fifty dollars and eighty-seven cents ($56,050.87).

SEC. 4. For the purposes aforesaid, Eighth Avenue Paving District Number One of the City of Denver is hereby created and established, the same consisting of all the lots and lands, to their full depth, not exceeding one hundred and fifty (150) feet, abutting on each side of Eighth avenue, from the east property line of Sherman avenue to the West property line of Lafayette street, in the city of Denver, and of all the frontage on all the intersecting streets within a distance of one-half block in each direction from each intersection of the said Eighth avenue, between said limits.

SEC. 5. All bonds and warrants to be issued in payment for said improvements shall bear interest at the rate of not more than six (6) per cent. per annum, payable semi-annually.

JACOB FILLIUS,
President of the Board of Supervisors.
ROBT. M. GOLDER,
President of the Board of Aldermen.

Signed and approved by me this 1st day of June, A. D. 1899.

H. V. JOHNSON, *Mayor.*

Attested by the undersigned with the corporate seal of the city of Denver.

[SEAL.] FRANK KRATZER,
City Clerk.

Published in The Denver Republican this 4th day of June, 1899.

That in its attempted enactment of said so-called ordinance No. 57 of the series of 1899 the defendant city did not comply with an act entitled

"An act to revise and amend the charter of the City of Denver, approved April 3, 1893"

commonly known as the City Charter of the City of Denver, in that said act at section 8 of article 2 thereof at all times herein mentioned provided:

"No ordinance shall take effect until published in some newspaper of general circulation published in the City of Denver, or in book or pamphlet form by authority of the City Council."

That notwithstanding the recitations in said so-called ordinance 57 that certain findings of fact were made by the City Council, no findings were in fact ever made by the City Council by ordinance or otherwise recited in said ordinance or at all; that no hearing or opportunity for hearing of any kind before said City Council, or either body thereof, or any committee of either body thereof, was ever had or permitted, and neither the said petition of property owners, or any of the preliminary, or other proceedings in the matter of said alleged district, or any evidence of any of the proceedings claimed to have been had or taken place were before said council, or either branch ther-of, or any committee of either branch thereof, at or prior to the enactment so-called of said so-called creating ordinance; and the so-called findings were not in truth or in fact finding at all but purely *ex parte* recitals without hearings or opportunity for hearings, or any investigation whatsoever by said council or any of the members thereof, and did not and do not constitute due process of law, but are and each thereof is wholly illegal, unauthorized and void.

Plaintiffs allege that notwithstanding said provision said so-called ordinance was never legally published in any newspaper; that the same was not published in book or pamphlet form. That said ordinance if published at all was published but once and then solely and only on Sunday in the Denver Republican on Sunday, June 4th, 1899, and was not published on any other date at any other time in any other newspaper or in any other manner whatsoever; that a publication in a Sunday newspaper is no publication at all, and was and is illegal and invalid and has been so declared by the Supreme Court of the State of Colorado, as well as also by this Court; that plaintiffs did not see said pretended publication if any or the said pretended ordinance or have any notice or knowledge thereof, and did not have any notice or knowledge of any other publication or notice, matter or thing herein alleged until about the time of protesting against the assessment as hereinafter set forth.

That the property owners who had subscribed the said remonstrance or remonstrances above herein mentioned, and also many of the parties who had withdrawn from the said petition for Bermudez Ashphalt, signed the said Alcatraz petition; but each and all of said parties so signing said Alcatraz petition, whose names were formerly on the Bermudez petition, signed said Alcatraz petition as

a petition opposed to said Bermudez petition and in the nature of a protest against the doing of said work under said Bermudez petition; that said parties considered said Bermudez petition as dead by reason of said withdrawals and remonstrances and for other reasons, and nothing contained in said Alcatraz petition had any reference to said Bermudez petition, and said Alcatraz petition was so signed without in any manner recognizing the right of said Board to decline to recognize their right to withdraw and remonstrate against the Bermudez petition, they still insisting upon the legality of the said remonstrance and withdrawals above herein mentioned and upon the illegality and insufficiency of the said Bermudez petition.

That if paving has been laid or improvements attempted in pursuance of said so-called ordinance No. 57 of the series of 1899 on the Street known as Eighth Avenue in the City of Denver or in said so-called Eighth Avenue Paving District No. 1 the same was not laid or done at the official grade, and if laid or done at all was laid and done at a different grade than the official grade; that the official grade of the said Eighth Avenue was and is as designated in a certain ordinance of said City entitled ordinance No. 26 of 1898.

That the said improvements were not laid or placed at said grade described in said ordinance No. 26 of 1898; that the laying of the said pavement was by the said Board ordered to be begun August 1st, 1899. That said pavement was laid if at all with Bermudez Lake Asphalt as the only wearing surface at the grades designated in a certain pretended ordinance known as Ordinance No. 94 of the series of 1899, whereby the grades on Eighth Avenue and cross streets within the boundaries of said pretended district were attempted to be changed, which said ordinance was and is as follows:—

By Authority.

Ordinance No. 94, Series of 1899.

Supervisors' Bill No. 37. Introduced by Supervisor Mitchell.

A Bill for an Ordinance Changing the Official Grades of Both Sides and the Center Line of Eighth Avenue, from the West Line of Sherman Avenue to the West Line of Logan Avenue, and the Intersecting Avenues, in the City of Denver.

which said ordinance No. 94 of 1899 was signed and approved by the Mayor of said City and officially published in The Denver Republican on September 3rd., 1899.

11 That the said pretended ordinance No. 94 of the series of 1899 was not and is not and never has been an ordinance of the City of Denver and the same was never published in book or pamphlet form and was published if at all but once and then only in the Sunday Denver Republican of Sunday, Sept. 3, A. D. 1899, by reason whereof the same was not and is not an ordinance of the City of Denver, and the so-called grades designated therein are not

the official grades; that to change the grade of a street in the City of Denver the passage of an ordinance by the city council and the legal publication of the same is necessary, and without such action by the said City Council the so-called Board of Public Works had and has no right, power or authority to change the grade of any street in said City, and the change of grade as designated in said ordinance was and is wholly unauthorized and without authority.

That thereafter there was published in The Denver Republican a certain publication entitled "Amended notice of completion of local improvements and the apportionment of the cost thereof;" the first publication thereof being in the issue of January 4th, A. D. 1900, wherein it was stated

"That any complaints or objections that may be made in writing by the owners of the real estate relative to the apportionment filed with the city clerk within thirty days of the first publication of this notice will be heard by the city council before the passage of an ordinance assessing the cost of said improvements, and that after the period specified in said notice the City Council, sitting as a Board of Equalization will hear and determine all such complaints and objections and will by ordinance assess the cost of such improvements against all real estate in said district as by the city charter provided."

That within and before the expiration of thirty days from said fourth day of January, A. D. 1900 each of the plaintiffs herein filed a written protest and complaints and objections with the City Clerk Complaining, protesting and objecting to each and all of the proceedings hereinbefore in this complaint mentioned, and particularly objecting to the apportionment of said alleged cost and the amount and justness of the tax against their respective properties severally and respectively.

That notwithstanding the same the City Council of the City of Denver never met as a board of equalization for the purpose of hearing or determining said complaints and objections, and did not meet or pass upon the said complaints, protests and objections; that if the members of said City Council met at all they met as individuals merely without any call from the mayor and without any call whatsoever, and without the knowledge or notice of any of these plaintiffs and without the previous knowledge or notice of any of these plaintiffs; that the call if any there was for the meeting of such Board of Equalization was not signed by the mayor until after some of the members of the City Council had pretended and assumed without any call to sit as a board of equalization and to pass upon and approve the assessment referred to in said notice published in the Republican of January 4th, 1900; that if the members of said City Council or any of them ever passed upon the said protest or objections they denied the said protest without notice or hearing to the protestors or objectors or any of them when they were not called or properly in session as a board of equalization and no call for them to sit or act as such Board had been signed by the mayor, and they pretended to deny such protests solely and only on the ground that the same raised objections with which they had no right to deal;

that such protests, complaints and objections so filed, in addition to raising complaints and objections with which by reason of the same being jurisdictional the City Council had no right to pass upon or to settle, each raised complaints and objections to the amount of the assessment against each lot of the plaintiffs, which the City Council sitting as a Board of Equalization had a right to pass upon
12 and which under the charter and law it was their duty to pass upon when properly in session under a proper call, and sitting as a Board of Equalization, but which by the act of some of the members of said Council as individuals aforesaid claimed or pretended that the city council had no right or authority to pass upon the same; all of which appears from the records of the City Council of the City of Denver, and all of which was done without the notice or knowledge of any of these plaintiffs or any of objectors and they did not nor did any of them have opportunity for, nor were any of their said complaints and objections ever passed upon or determined by the City Council sitting as a Board of Equalization. That the apportionment mentioned in said notice was unfair and it was the desire and purpose of the plaintiffs to have said City Council sitting as a Board of Equalization pass upon the same. That of the property included in the ordinance next hereinafter mentioned known as ordinance No. 23 of the series of 1900 the plaintiffs whose names appear below are the respective owners of the respective lots, pieces and tracts of land, all situate in the City of Denver, Arapahoe County, Colorado, set opposite their respective names as follows:—

Lots in Block 130, South Division of Capitol Hill, Owned by Wolfe Londoner.

Lots No.	Street.	No. feet fronting thereon.	Assessment per front foot.	Total.
12	Clarkson	125	.74672	$93.34
12	8th Avenue	33.02	7.0369	232.36
13	8th Avenue	25.02	7.0331	176.07
14	8th Avenue	25.02	7.0331	176.07
15	8th Avenue	25.02	7.0331	176.07

That plaintiff Dennis Sheedy is the owner of lots numbered thirteen (13) to seventeen (17) both inclusive in block numbered thirteen (13) in Emery's Capitol Hill Addition to the City of Denver; that said lots have a frontage on Pennsylvania Avenue only, on which they each front 25 feet and are each assessed for said frontage the sum of $23.00, a total assessment of $23 against each of said lots; that said lot seventeen (17) has a frontage of 10.83 feet on Pennsylvania Avenue and is assessed for said frontage $9.96; that each of said lots have a frontage on the alley in said block 13 in Emery's Capitol Hill Addition to the City of Denver but are not assessed therefor; that said Dennis Sheedy is also the owner of lot 17 in block 13 Arlington Heights Addition to the City of Denver (the same being located at the corner of 8th., Avenue and Pennsylvania Avenue and

not exceeding 10.4 feet in width fronting on Pennsylvania Avenue by 125 feet in length fronting on 8th., Avenue); that said lot is assessed for its frontage on Pennsylvania Avenue $9.57; that said lot is assessed for its 125 feet frontage on 8th., Avenue $1013.84, and that the total assessment against the said lot is the sum of $1023.41, which is greatly in excess of the value of said lot; that said Dennis Sheedy also owns out-lot numbered fifty (50) in South Division of Capitol Hill, which said property lies immediately to the south of lot 17 in block 21 Inslee's Addition to the City of Denver (amended map) and has a frontage of 4.8 feet on Downing Avenue, and is assessed for said frontage the sum of $3.60; that said lot also has a frontage of 125 feet on 8th., Avenue and is assessed for said frontage $823.68, a total assessment against said lot of $827.28, which is greatly in excess of the value of said lot.

13 That thereafter and on March 23rd, A. D. 1900, said City Council of the said City of Denver enacted an assessing ordinance known as ordinance No. 23 of the series of 1900 which was and is regular on its face and purports to have been made by the corporate authorities under a statute authorizing the same, and which was and is in words and figures following:—

By Authority.

Ordinance No. 23. Series of 1900.

Supervisors' Bill No. 14. Introduced by Supervisor Canon.

A Bill for an Ordinance Assessing the Cost of the Grading, Curbing, Paving and Other Improvements in Eighth Avenue Paving District No. 1, of the City of Denver.

Whereas, In and by ordinance No. 57 of the series of 1899, of the City of Denver, signed and approved on the 1st day of June, A. D. 1899, the Eighth Avenue Paving District No. 1 of the City of Denver was established, and the grading, curbing, paving and otherwise improving of Eighth avenue therein from the east property line of Sherman avenue to the west property line of Lafayette street was duly authorized, in accordance with the details, plans and specifications adopted by the Board of Public Works of the City of Denver; and,

Whereas, In pursuance of said ordinance said grading, curbing, paving and other improvements have been constructed and completed, and the same have been accepted by said board; and,

Whereas, Said board has heretofore prepared a statement, therein showing the whole cost of said grading, curbing, paving and other improvements, including six per cent. additional for costs of collection and other incidentals, and interest to March 1st, A. D. 1900, and apportioning the same upon each lot or tract of land to be assessed for the same, as in and by the city charter provided, and has caused said statement to be certified by the president of said board and filed in the office of the City Clerk; and,

Whereas, The City Clerk has, under date of January 2d, A. D. 1900, by advertisement for ten (10) days in the official paper of the city, to-wit: in the Denver Republican, the same being a newspaper of general circulation published in said city, notified the owners of all the real estate to be assessed as aforesaid that said improvements have been completed and accepted, therein specifying the whole cost of said improvements and the share so apportioned to each lot or tract of land in said district, as hereinafter set forth, and that any complaints or objections that might be made in writing by the owners of said real estate to the City Council and filed with the City Clerk within thirty (30) days from the first publication of said notice (the first publication being on January 4th, A. D. 1900), would be heard and determined by the City Council before the passage of any ordinance assessing the cost of said improvements; and that after the period specified in said notice the City Council sitting as a board of equalization would hear and determine all such complaints and objections and would by ordinance assess the cost of said improvements against all the real estate in said district as by the city charter provided; and,

Whereas, Said period of thirty (30) days has expired and the City Council, sitting as such board of equalization, has considered all complaints and objections filed as above provided, has determined that the same were without merit, and has declined to recommend to the Board of Public Works any modification of said assessments; and,

Whereas, It appears from said statement of said board that the whole cost of said improvements, including six per cent. additional for cost of collection and other incidentals, and interest at the rate of six per cent. per annum, to March 1st, A. D. 1900, is the sum of fifty-five thousand eight hundred and forty dollars and eighty cents ($55,840.80), and that the share of the cost of said improvements as apportioned by said board to each lot and tract of land in said district is as hereinafter set forth; therefore,

Be it Enacted by the city council of the City of Denver:

SECTION 1. That upon consideration of the premises the city council doth find that said improvements were duly ordered, and that in their action and proceedings in reference to said improvements, said board has fully complied with the charter and ordinances of said city relating thereto.

SECTION 2. Said apportionments are hereby approved, and the cost of said improvements, to-wit: the sum of fifty-five thousand, eight hundred and forty dollars and eighty cents ($55,840.80), is hereby assessed against all the real estate in said district in accordance with said apportionment, and the same is hereby apportioned to and assessed upon all the lots and tracts of land in said district as follows, to-wit:

(here follows a list of the several lots and tracts of land in said alleged district, with their several frontages on the several streets and the amount of the assessment therefor).

14 SEC. 3. Said assessments shall be payable within thirty (30) days of the publication of this ordinance without demand; provided, that said assessments may at the election of the

owners of the property assessed be paid in installments, with interest thereon at the rate of six (6) per cent. per annum, as by the city charter provided. Failure to pay the whole assessment within said period of thirty (30) days shall be conclusively considered and held an election on the part of all persons interested, whether under disability or otherwise, to pay in such installments. In case of such election the principal of said assessments shall be payable in ten (10) equal annual installments, and the first of said installments shall be due and payable on the 1st day of March, A. D. 1901, and the remainder of said installments shall be due and payable successively on the same day in each year thereafter until paid in full, with interest from March 1st, A. D. 1900, in all cases on the unpaid principal of each of said installments until maturity thereof at the rate of six (6) per cent. per annum, payable annually with said installments respectively. Failure to pay any installments, whether of principal or interest, when due, shall cause the whole of the unpaid principal to become due and payable immediately, and the whole amount of the unpaid principal and accrued interest shall thereafter draw interest at the rate of one (1) per cent. per month, or fraction of a month, until the day of sale. Provided, that payment may be made to the city treasurer at any time within thirty (30) days of the publication of this ordinance, and in such case an allowance of six (6) per cent. shall be made upon all payments made during said period only.

JACOB FILLIUS,
President of the Board of Supervisors.
ROBERT M. GOLDER,
President of the Board of Aldermen.

Signed and approved by me this 21 day of March, 1900.
H. V. JOHNSON, *Mayor.*

Attested by the undersigned with the corporate seal of the City of Denver.
[SEAL.] FRANK KRATZER,
City Clerk.

Published in the Denver Republican this 23d day of March, 1900.

That all of the said proceedings of the City of Denver on their face purport to be made by the corporate authorities of the City of Denver under a statute authorizing the same, but are not, as above herein mentioned, in fact in accordance therewith, but that, nevertheless, the said assessment above herein mentioned is by the laws of the State of Colorado made *prima facie* evidence of the performance and existence of all prerequisites necessary to make the same a legal and valid assessment; that by the said assessing ordinance liens and clouds are cast upon the property of the plaintiffs; that the invalidity of the said proceedings has to be shown by evidence *de hors* the record, which evidence is liable to be lost and destroyed and by reason of its liability to loss and destruction may be lost to and beyond the power of the plaintiffs herein to later produce in case an injunction and the relief prayed for is not granted.

That by the Charter of the City of Denver the Board of Public Works so-called is expressly declared to be an executive body only and is not and never was a legislative body; that under the said charter the City Council of said City is the only legislative body of said City; that nevertheless section 2 of Artcile 7 of said charter provides:

"Whenever the Board of Public Works shall by resolution order any of the local improvements herein mentioned the same shall be authorized by ordinance, which ordinance shall be in the form recommended by the Board of Public Works by endorsement thereon and shall not be subject to amendment by the City Council."

That in and by said section, as well as certain other sections of said charter, it is attempted to deprive said City Council, the legislative body of said City, of the legislative function to enact such an ordinance for the benefit of the public concerning public improvements as it shall deem wise or see fit, and to amend, alter or change the ordinance recommended by the Board of Public Works to them for passage concerning public improvements, and deprive said Council of legislative discretion, power and authority which properly belong to and can be properly and legally exercised only by said Council; that under said act and particularly by said section 2 the City Council is required to pass any ordinance which the Board of Public Works shall by resolution order concerning said public improvements in said article mentioned, thereby giving to the said Board powers and authority which properly do not belong to an executive department of said City and do not properly belong to the Board of Public Works; that under said section the City Council cannot alter, change or amend any such ordinance so recommended to them by endorsement of said Board thereon; that said Council is by section 31 of Article 7 of said Charter, as well as other sections, when properly called together as such made a Board of Equalization to hear and determine complaints and objections and recommend to the Board of Public Works modifications of the proposed assessment or apportionment of the cost of improvements made by said Board, but that the said Council is not given the power which rightfully belongs to it but is by the said section deprived of such power, right or authority to alter, change or modify an apportionment of said cost or alter any apportionment or assessment attempted to be made by said Board, without the consent of said Board; and only the Board of Public Works is by said section and by said charter given the power to alter or change any such assessment or apportionment, thereby attempting to grant to the said Board (a purely executive body) legislative power and discretion; that if said Board do not consent to any change or alteration recommended by the City Council, under said section the said change or alteration cannot be made, and the City Council has only under said charter the power to pass or decline to pass any recommendation made by said Board of Public Works Concerning public improvements in the form recommended and none other; and that thereby there is conferred on a special commission, body or association, known as the Board of Public Works, the power to make, supervise and interfere with municipal

improvements, money, property or effects in violation of the Constitution of the State of Colorado; and by said charter, and particularly by said section the City Council can only veto or approve such recommendations of the Board of Public Works, and that said charter and said sections are against public policy; that in addition to the matters and things aforesaid the said charter thereby permits of the tying up of ordinances, resolutions and public improvements generally in the event of a failure of agreement between the Board of Public Works and the City Council, all to the irreparable injury and detriment of the public and in violation of the Constitution of the State of Colorado; that nowhere in said City Charter or in any of the ordinances, notices, resolutions, acts or doings in said pretended Eighth
16 Avenue Paving District Number One of the City of Denver is there any provision fixing any mode or means either for determining the amounts of special benefits conferred upon or received by any of the real estate, nor is there any provision fixing any mode or means for determining the amount of damages received by abutting or other property from such improvements, or for the payment of such portion as may be found to be in excess of the substantial benefits, or for the allowance of any such portion as may be found in substantial excess of the benefits; or for the payment or allowance or charging of or allowance for benefits enjoyed or received by the general public; but on the contrary thereof the whole of the pretended cost of the said pretended improvements, and particularly the cost of this so-called improvement, is by said charter, ordinances, notice and act required or attempted so to be, and is arbitrarily and without any attempt at determination of the benefits or damage to the property assessed, required to be arbitrarily assessed against the property in the said pretended district (exclusive of highways) without notice or hearing or due process of law, according to the front foot rule only upon a district which is arbitrarily created by the engineer of the said board without authority of law and without regard to or the taking into consideration of benefits or damages received or suffered by said pretended improvements; that there is no provision whatsoever for enforcing or apportioning the amount of an assessment for public improvements to be paid by street railway companies, or as to what share said companies shall pay, and if any payment is made by street railway companies the same is made voluntarily only, and payment for such public improvements cannot be enforced against street railway companies; that no opportunity is by the said charter given for the hearing of complaints or objections against the apportionment of the assessment before the board which under the charter is granted the power to levy the assessment; that under the said charter and particularly under section 31 of said article 7 thereof the Board of Public Works is given the power to modify and change the apportionment of the cost regardless of the findings, wishes or desires of the City Council after said City Council has heard complaints and objections filed by property owners in the district; and said Board after such recommendations have been made to the Board by the Council is not bound by said recommendations, but may without any opportunity whatsoever for the property owners

to be heard, modify, change and alter the apportionment in any manner it sees fit, and on the City Council being notified of such final decision of the Board the City Council is by said section required by ordinance to assess the cost of said improvements without any opportunity whatsoever on the part of the property owner to be heard; that by said section and said charter the owner of the property assessed for the cost of the improvement is given no opportunity to be heard or to complain or object to the apportionment and is denied due process of law; that as applied to the facts of this case the front foot rule of assessment is not fair; that the property assessed including the property of the plaintiffs in not benefited, and if benefited is not benefited to the extent of the assessment; that the highways in the said district belong to the city of Denver and are greatly bene-
17 fited by the improvements, and the improvements from the nature of things must be constructed if at all almost entirely thereon; that the general public is substantially benefited by proper paving, grading and curbing of highways; that neither the general public nor the highways are assessed for any portion of said improvements; that as applied to the facts in this case the front foot rule is unfair and the real estate in said district abutting on Eighth Avenue consists of lots and lands which are not of substantially equal depth, and the same are not assessed or attempted to be assessed to a substantially equal depth of not less than 20 nor more than 150 feet from the street improved; that those portions of Eighth Avenue which were by said pretended ordinance No. 57 ordered to be improved included certain additions to the City of Denver known as Emery's Capitol Hill Addition, Arlington Heights Addition, Inslee's Addition, Inslee's Addition Amended Map, the South Division of Capitol Hill and other additions and subdivisions; that a portion of Arlington Heights Addition abuts and fronts on that portion of Eighth Avenue so ordered to be improved its entire length from the east side of Sherman Avenue to the middle of the block of Eighth Avenue between Clarkson Street and Washington Avenue in said city, and abuts and fronts within said district on both sides of Eighth Avenue, but that on the north side of Eighth Avenue there is simply a strip of land in Arlington Heights Addition to the City of Denver which in its entire width is nowhere the width of twenty feet nor the width of a lot, but is only a fractional piece or strip and does not exceed in width at any point 17 feet and varies in width in the various lots in Arlington Heights Addition on the north side of Eighth Avenue from 17 feet to as low as 2 feet; that the width of the same lots or strips varies and the lots or strips are not of the same width at one end as at the other; that out-lots numbered fifty (50), fifty-one (51), fifty-two (52), fifty-three (53) and fifty-four (54) in the South Division of Capitol Hill do not any of them exceed three feet in width, and each of said out-lots or strips front on Eighth Avenue on the north, but are too small in width for use as residence or any other use alone by themselves; that each lot of each of the plaintiffs is 125 feet in length and the only portion of any of said lots which abuts on the said Eighth Avenue or any of the intersecting streets is shown in the list of property of the plaintiffs hereinbefore on pages

17 and 18 set forth; that none of the said strips are of any use alone and of themselves and are not benefited by the said improvements, and the benefits to the said lots do not equal the amount of the assessment against the same; that the value of none of said strips alone and of themselves exceed, towit, the sum of One Hundred ($100.00) Dollars each; that each of the said narrow lots above mentioned are assessed not less than Nine Hundred and Ninety ($990.00) Dollars and in some instances over One Thousand ($1000.00) Dollars each, and are each assessed as much or within a few dollars of as much as are full lots within the said district abutting 125 feet on Eighth Avenue by 25 feet on an intersecting street, and in many instances are assessed for a greater amount than are such full lots; that a half block to the south of Eighth Avenue is a great many more feet and includes a great many more lots than a half-block to the north
18 of Eighth Avenue; that many of the lots abutting on said Eighth Avenue are so platted that only 25 feet thereof front on Eighth Avenue, while other lots are so platted that they abut on Eighth Avenue for the whole 125 feet and in some cases more.

That by the said assessment it is attempted to take, injure and confiscate the property of each of the plaintiffs herein in violation of the provisions of the Constitution of the United States of America and in violation of the Colorado Constitution, and the said assessment and the proceedings herein complained of are in violation of Article 5 of the Amendments to the United States Constitution and of a similar provision in the State Constitution, which prohibit the taking of private property for public use without just compensation and the deprivation of property without due process of law; and further are in violation of Article 14 of the Amendments of the Constitution of the United States which denies to the State of Colorado, or any person, body or municipality existing under authority attempted to be conferred by said State, the right to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, and which shall deprive any person of life, liberty or property without due process of law; that the same and each thereof are also in conflict with section 14 of Article 2 of the Colorado Constitution which provides that private property shall not be taken for private use except by the consent of the owner, and of section 15 of Article 2 of said Constitution which provides that private property shall not be taken or damaged for public or private use without just compensation. Also of section 25 of Article 2 of said Constitution which provides that no person shall be deprived of life, liberty or property without due process of law; that said assessment is not uniform upon the same class of subjects within the territorial limits of the authorities levying the assessment and is not assessed or collected under general laws or under regulations which secure just valuation for taxation of all property, in violation of section 2 of article 10 of said State Constitution; that by said proceedings it is attempted to take private property, to-wit, the property of these plaintiffs, and sell the same for the payment of a corporate debt of a municipal corporation, to-wit, the defendant City, in violation of section 1 of article 10 of said Constitution, in that bonds were issued by the

said city and delivered to the contractor in payment of the work pretended to have been done by him, and that thereby said city lend or pledged its credit or faith, directly and indirectly to aid a private enterprise, in violation of Section 1 of said article 2 of said Constitution.

That subsection 3 of section 3 of article 7 of said charter is unfair, unconstitutional and void in that it permits the owner of property on intersecting streets to force upon the owners of the frontage on the street paved an improvement for which the owners of the said frontage on the street to be paved will be assessed for the entire substantial cost against their will or consent by the petitioning of a frontage on intersecting streets, without regard to whether a majority or any of the owners of the frontage on the street paved petition for or desire the paving, and the said section does not take into consideration the amount or proportion of the assessment which those petitioning would have to bear of the cost of the improvement,
19 and does not distinguish or give greater power or authority to those who have to pay the bulk of the assessment than it does to those whose assessment is comparatively small, and does not take into consideration the question of benefits or damages to be derived or resulting from the contemplated or other improvements. That said section further permits the owners of a majority of the frontage on the street to be paved to coerce and force the owners of intersecting streets to the extent of a half block in each direction to pay for the intersection, when the owners of property on said intersecting streets to the extent of a half block from the street paved may not desire the improvement at all and may not have petitioned for the same; that the owners of property on intersecting streets not paved are not benefited by the paving and should not be assessed with any part of the cost thereof.

That said defendant city claims and pretends that said assessment so attempted to be made is a lien and claim to and in the amount by the said pretended assessing ordinance attempted to be assessed against the lots and lands in said so-called district, and particularly against the lots and lands of the respective plaintiffs hereinabove mentioned; that said city has caused to be prepared a permanent local assessment roll, so-called, and has included therein the said assessments against the respective lots, pieces and parcels of land, and each of them above mentioned, belonging to the plaintiffs respectively, and has caused the same, together with warrants for the collection of the same, to be certified and delivered to the defendant County Treasurer of Arapahoe County, Colorado, who in his capacity of *ex-officio* collector of the City of Denver is attempting to collect the same and threatens to and will advertise the said lots, pieces and parcels of land above mentioned, and particularly those belonging to these plaintiffs, for sale and to be sold for said assessments severally and respectively unless the said assessments are paid; that there is nothing due or owing from the plaintiffs herein or any of them or their said property or any thereof for or on account of any improvements made or pretended to have been made in said pretended district; that if said sales are made under

the laws of the State of Colorado, unless the amount of the said assessments, together with interest and penalties thereon, are paid, tax deeds will issue to the purchasers at said sales, which are by the laws of said State made *prima facie* evidence of the regularity of all prior proceedings and in time become conclusive evidence of the regularity of said proceedings; that by reason of the said assessment said plaintiffs are deprived of the right which they would otherwise have and which they could and would exercise of selling their said property, and they are thereby prevented from selling their said property, unless they pay the said assessment, and the plaintiffs severally and respectively are hindered and delayed in the exercise of and deprived of their constitutional rights and the enjoyment of their said properties, severally and respectively; all to their great and irreparable damage and injury.

That the said assessment is regular on its face, and the irregularities in the proceedings have to be shown by evidence *de hors* the record; that by the said assessment liens and clouds are cast upon their said properties and doubts cast upon their titles thereto, and by a sale of said property further doubts and further clouds will be cast on their said property, and also by the issuance of tax deeds against the same; that the plaintiffs are without and can obtain no adequate legal remedy in the premises, and that such legal remedy as they might resort to, if any there be, is inadequate, incomplete and uncertain, and would require a great multitude of suits and circuity of action if obtainable at all, and full and complete justice can only be done the plaintiffs or any of them in a Court of Equity.

Wherefore, plaintiffs pray that the defendants may be summoned to appear before this honorable Court and answer this complaint and to abide by and perform such order and decree in the premises as shall be meet and proper; that in the meantime a temporary injunction may issue out of and under the seal of this honorable Court, directed to the said defendants and each of them and their and each of their successors, officers, agents, servants and employés, restraining and enjoining them and each of them from in any manner enforcing said assessment, or attempting so to do, and particularly so far as the same relates to any of the lots or parcels of land of any of the plaintiffs herein, or advertising or selling said property or any part thereof, or attempting so to do, or in any manner clouding the titles of the plaintiffs to any of the lots, pieces or parcels of lands above herein mentioned, or interfering with or molesting these plaintiffs respectively in the occupancy, use or enjoyment of their said property, until the further order of this Court and pending the final determination of the validity of said assessments by the highest tribunal to which this cause may be taken for review; that upon final hearing said temporary injunction may be made perpetual and the lien and cloud of said assessments removed from the plaintiffs' titles, and the assessments declared, adjudged and decreed to be null and void and of no force or effect, as applied to these plaintiffs and their respective lots, pieces and parcels of land above mentioned; and

plaintiffs pray for such other and further relief in the premises as shall be meet and proper, and for costs.

JOSHUA GROZIER,
Attorney for Plaintiffs.

Verification.

On July 9, 1901, defendants file their answer which admits the ownership of property by the plaintiffs as alleged in the complaint; affirmatively alleges that each of the acts and doings of defendants in the matter of said assessment was in accordance with the City Charter of 1893; denies each of allegations of fact of irregularity and alleges that on January 18, 1898, there was filed with the Board of Public Works the Alcatraz petition which was in words and figures as follows, to wit,

Petition for Asphalt Pavement.

To the Honorable Board of Public Works, the City Council and Mayor of the City of Denver, Colorado:

We, the undersigned, owners of the frontage of the lots and tracts of land described opposite our respective names, respectfully petition your honorable bodies in the particulars hereinafter set forth, and we file this petition in pursuance of the charter of the City of Denver now in effect, and in case any other petition is before your boards for any or all of the purposes herein set forth, we file this in addition to and supplemental to the said petition, and for the purpose of better carrying out and accomplishing the purposes of such other petition or petitions; and for the best interest of the property owners concerned, we hereby petition your Honorable Bodies to do the following things:

First. To create a paving district of, and order the grading, curbing, paving and necessary appurtenances thereto, of the following street or streets:

Eighth Avenue, from Sherman Avenue to Lafayette Street, in the City of Denver, including all unpaved street and alley intersections in the paving district so created.

Second. To use for the wearing surface of such pavement, sheet asphaltum, made from one of the three following designated materials: Trinidad Lake Asphalt, obtained from the pitch or asphalt lake in the Island of Trinidad; Pacific Asphalt Paving Cement, obtained from the mines or refineries of The Pacific Asphalt Paving Company, in Santa Barbara County, California, or Alcatraz Asphalt, obtained from the mines and refineries of The Alcatraz Company, in Santa Barbara County California.

Third. We designate as the particular material for the wearing surface, that one of the above named three asphalts, upon which you receive the lowest bid, in dollars and cents, from a reliable and responsible bidder.

Fourth. That you require a five year guarantee, and that the work be ordered on the ten year installment plan.

Fifth. That you refuse to award any contract for said paving upon any bid which names a price exceeding One dollar and ninety-eight cents ($1.98) per square yard for a pavement composed of concrete six inches thick, a binder three-quarters of an inch thick, and asphalt wearing surface two inches thick.

21 On October 11, 1900, come the plaintiffs aforesaid by their attorney and file in said court their replication to the answer of the defendants and in and by said replication deny each and every allegation of the said answer.

On October 15th, 1901, upon the written stipulation of counsel for plaintiffs and defendants, an order is entered by the said court in the said cause. "That separate judgments and decrees be given as to each plaintiff and no plaintiff shall be prejudiced in any manner by being included in a suit wherein other plaintiff or plaintiffs are included, but each plaintiff shall be granted such relief, if any, as by the evidence and testimony he shall show himself entitled." December 18, 19 & 20, 1901, trial to Court; December 31, 1901, finding by the Court of each of the issues for plaintiffs; decree for plaintiffs on January 6, 1902.

Bill of Exceptions.

December 18, 19 and 20, 1901, trial to the Court without a jury, each plaintiff and defendant introducing evidence and testimony supporting the several allegations of their own pleadings.

Defendants by their counsel in open court admits the ownership of the property by the plaintiffs as in the foregoing complaint alleged.

The testimony on behalf of the plaintiffs was in part as follows,—

BELA M. HUGHES called as a witness by plaintiffs, after being first duly sworn, testified;—Am Secretary of the Board of Public Works of Denver, and as such custodian of their records. Testifying from their records introduced in evidence testifies that the total assessable frontage in the 8th., Avenue Paving District No. 1, as shown from these records is

Total feet frontage on 8th Avenue.....	6142.62 feet
Total feet frontage on intersecting streets.....	10853.36 feet
Total assessable feet frontage in District.....	16995.08 feet
One half thereof is.....	8497.54 feet

These records show that on May 24, 1897, the Bermudez petition set out in the complaint was filed with said Board, purporting on its face to be subscribed by the owners of 3535.5 feet of frontage on 8th., Avenue and by the owners of 5853.7 feet of frontage on intersecting streets, a total of 9399.2 feet frontage in district. Included among those subscribers of said petition as filed appears Emma C. Slayden as the owner of 1633 feet of frontage in the district, also John F. Campion as the owner of 733 feet of frontage in the district, also

Mary M. Grant as the owner of 73.5 feet frontage in the district, also Celia F. Hawkins as the owner of 233 feet frontage in the district, Henry Bohm as the owner of 25 feet frontage in the district, also Albert Glaspell as the owner of 250 feet frontage in the district and M. B. Carpenter as the owner of 225 feet frontage in the district.

EMMA C. SLAYDEN called as a witness by plaintiffs, after being first duly sworn, testified: I signed the Bermudez petition a copy of which is set out in the complaint, while it was being circulated; that on May 22, 1897, I had prepared and I signed and acknowledged before a notary public and filed and left with the Board of Public Works at their office on said May 22, 1897, a writing the 22 exact language of which I cannot recall but which stated in substance that 'I did not desire the paving and that I hereby withdraw my name from the said petition' for paving said Avenue.

S. W. SLAYDEN: Called as a witness by plaintiffs, after being first duly sworn, testified: Am Emma C. Slayden's husband; her testimony is true; I went with her and filed the writing as testified to by her.

CLARK C. FENNER, called as a witness by plaintiffs, after being first duly sworn, testified,—Am an abstractor of titles; that at the time of signing said Bermudez petition and at the time of signing and filing said writing purporting to withdraw with said Board the said Emma C. Slayden was the owner of 994 feet of frontage on 8th Avenue and 639 feet of frontage on intersecting streets all in said alleged district.

M. B. CARPENTER, called as a witness by plaintiffs, after being first duly sworn, testified: Q. Do you know what was ever done regarding that petition,—the Bermudez petition a copy of which is set out in the complaint? A. It was about the time this petition was presented, or afterwards, that there were several withdrawals from it. We tried to argue to the Board of Public Works that there was sufficient withdrawals and inaccuracies to cause them not to submit an ordinance to the Council, but they would not consider those withdrawals and did present an ordinance to the Council, and then we went before the Council and killed it there; we killed this petition and the ordinance and everything else; and it came up again, but I don't remember how but I think they undertook to resurrect it under both petitions. I know that we convinced the Committee—the committee happened to have two lawyers upon it,—Will Tebbitts and Jim Cherry. I made an argument before them as to the insufficiencies of this petition and the fact that the Board had not permitted these withdrawals to go in and we killed the ordinance—they reported against the ordinance and the ordinance was voted down. I owned 100 feet by 125 feet at the corner of 8th and Grant Avenues and appeared not only for myself but also for the following people as withdrawing,—Slayden, Campion, Mrs. Grant, Hawkins, Bohm, Glaspell. Mr. Ritter: Q. That is in the City Council? A.

The City Council. But they had a habit down there of *resercting* things.

BELA M. HUGHES recalled, and further testified from the Board of Public Works records,—The records here show that on January 18th, 1898, the Alcatraz petition set out in the complaint was filed with the Board of Public Works; the report of the Engineer of the Board shows it to be signed by a total of 8742.32 feet of frontage of which frontage 8593½ front feet was also on the Bermudez petition as originally filed and including those frontages claimed to have withdrawn.

JAMES H. BROWN, called as a witness by plaintiffs, after being first duly sworn, testified: As attorney for Richard Huson Hart I commenced a mandamus suit against the Board of Public Works to compel the Board to receive withdrawals of signatures from said Alcatraz petition. The case is number 27479 in the District Court and is a file of this court. (Plaintiffs offer in evidence said mandamus complaint and acceptance of service of same with a copy of the mandamus writ issued by the court attached.) Same, omitting caption, was as follows:

23 1. That at all times hereinafter mentioned, the City of Denver was, and still is, a municipal corporation, duly created, organized and existing under and by virtue of a special charter, enacted by the General Assembly of the State of Colorado, and by its provisions made a public act, and as such municipal corporation, was and is residing in the county of Arapahoe aforesaid.

2. That at all the times hereinafter mentioned, your petitioner was the owner of lots numbered consecutively from eighteen (18) to twenty-one (21), both inclusive, all in block numbered thirteen (13), in Emery's Capitol Hill addition to the City of Denver, which was and is within the corporate limits of the said City of Denver, said lots having a frontage upon the portion of Eighth avenue hereinafter mentioned, of about one hundred and twenty-five feet, and upon a street intersecting said portion of said Eighth avenue, and within one-half (½) block thereof, or about one hundred (100) feet.

3. That during the year A. D. 1897, and, as your petitioner believes, some time about the month of May thereof, there was then being circulated among the owners of property abutting upon that portion of Eighth avenue, of the said City of Denver, situate, lying and being between the east line of Sherman avenue and the west line of Lafayette avenue, a petition for the improving and paving thereof with sheet asphalt, which said petition was addressed to that certain department and agency of said City of Denver, known as, called and styled The Board of Public Works, thereof, and in substance requested the said board to order the paving and improving of said portion of said Eighth avenue, and that the material to be used for the wearing surface thereof should, among other things, be comprized of Alcatraz asphalt.

4. That your petitioner not only signed the said petition, but that he is informed and believes, and so charges the fact to be, that the

same was also signed by one Emma C. Slayden, one John F. Campion, one Alice P. Chamberlain, one Henry Bohm, and one Celia F. Hawkins.

5. That petitioner is informed and believes, and so charges the fact to be, that at or about the time of the signing of said petition, and at all the times thereafter hereinafter mentioned, said Slayden was the owner of the following described property in said City of Denver, to-wit: Lots numbered from seventeen (17) to twenty-seven (27), both inclusive, in block numbered ten (10); lots numbered from eight (8) to thirteen (13), both inclusive, in block numbered eleven (11); fractional lot eighteen (18) in block numbered twelve (12); fractional lot eighteen (18), in block numbered thirteen (13); fractional lot numbered seventeen (17), in block numbered fourteen (14); fractional lot number seventeen (17), in block numbered fifteen (15); lots nu-bered from one (1) to four (4), both inclusive, in block numbered twenty (20); all in First addition to Arlington Heights; also lots numbered three (3) to thirteen (13), both inclusive, all in block numbered twenty (20), in Arlington Heights addition to Denver.

6. That said real estate of said Slayden had a frontage upon the said portion of said Eighth avenue of about eight hundred and ninety-four (894) feet, and upon the streets intersecting the said portion of said Eighth avenue within a distance of one-half (½) block in each direction from such intersection, in said portion of said Eighth avenue, of about six hundred and thirty-nine (639) feet.

7. That petitioner is informed and believes, and so charges the fact to be, that on or about the time of signing said petition, and at all times thereafter hereinafter mentioned, said John F. Campion was the owner of the following described property in said City of Denver, to-wit: Lots numbered consecutively from nine (9) to seventeen (17), both inclusive, all in block numbered twelve (12), and lots numbered consecutively from thirty-seven (37) to forty-six (46), both inclusive, all in block numbered twenty (20), in Emery's Capitol Hill addition to Denver.

8. That said real estate of said Campion had a frontage upon the said portion of said Eighth avenue of about two hundred and fifty-eight (258) feet, and upon the streets intersecting the said portion of said Eighth avenue, within a distance of one-half (½) block in each direction from such intersection, in said portion of said Eighth avenue, of about four hundred and seventy-five (475) feet.

24 9. That petitioner is informed and believes, and so charges the fact to be, that on or about the time of signing said petition, and at all the times thereafter hereinafter mentioned, said Alice P. Chamberlain was the owner of the following described property in said City of Denver, to-wit: Lots numbered consecutively from fourteen (14) to seventeen (17), all in block numbered fifteen (15), in said Emery's Capitol Hill addition to Denver.

10. That said real estate of said Chamberlain had a frontage upon a street intersecting said portion of said Eighth avenue, within a distance of one-half (½) a block in each direction from such inter-

section, in said portion of said Eighth avenue, of about ninety-six (96) feet.

11. That petitioner is informed and believes, and so charges the fact to be, that on or about the time of signing the said petition, and at all times thereafter hereinafter mentioned, said Henry Bohm was the owner of the following described property in said City of Denver, to-wit: Lot numbered twenty-four (24), in block numbered one hundred and thirty-five (135), in the South Division of Capitol Hill, in said city.

12. That said real estate of said Bohm had a frontage upon a street intersecting the said portion of said Eighth avenue within a distance of one-half (½) a block in each direction from such intersection in said portion of said Eighth avenue of about twenty-five feet.

13. That petitioner is informed and believes, and so charges the fact to be, that on or about the time of signing said petition, and at all the times thereafter hereinafter mentioned, said Celia F. Hawkins was the owner of the following described property in said City of Denver, to-wit: Lots numbered consecutively from eighteen (18) to twenty-one (21), both inclusive, all in block numbered one hundred and forty (140), in the South Division of Capitol Hill.

14. That said real estate of said Hawkins had a frontage on said portion of said Eighth avenue of one hundred and eight (108) feet, and upon the streets intersecting the said portion of said Eighth avenue, within a distance of one-half (½) a block in each direction from such intersection, in said portion of said Eighth avenue of about one hundred and twenty-five (125) feet.

15. That after signing the said petition to the said Board of Public Works of the City of Denver, requesting the use of Alcatraz for paving material as aforesaid, and before the same was filed with or presented to the said Board of Public Works for its action, and long prior to the commencement of this action, your petitioner and the said Slayden, Campion, Chamberlain, Bohm, Hawkins and other signers of said petition, who are the owners of property abutting upon said portion of said Eighth avenue and upon said intersecting streets as aforesaid, for reasons best known to themselves, signed the following withdrawal of signatures, to-wit:

"To the Honorable Board of Public Works of the City of Denver, Colorado.

"GENTLEMEN: The undersigned, having heretofore subscribed their names to a petition, or petitions, for the paving and improving of Eighth avenue, or some part thereof, in said city, requesting, among other things, the use of Alcatraz asphalt for the wearing surface thereof; and,

"Whereas, the undersigned are opposed to the use of said Alcatraz asphalt for the wearing surface of any such improvement, they therefore hereby withdraw their names from any or all such petition or petitions which request the use of such Alcatraz asphalt which may now or hereafter be filed with your honorable board."

16. That thereafter, and prior to the commencement of this action, your petitioner and the said Slayden, Campion and others, as aforesaid, not being able to find the person or persons so circulating and having charge and custody of said petition for paving, presented their said request in writing, withdrawing their consent and signatures from said paving petition to the said Board of Public Works of the said City of Denver, and requested that the said Board of Public Works receive the said written withdrawal of signatures, and place the same on file, so that whenever said petition for paving with Alcatraz, as aforesaid, should be presented to said board, the rights and interests of the said parties would be protected in the premises.

17. That thereupon the said Board of Public Works have failed, neglected and refused to receive or file the said withdrawal of signatures, although prior to this action respectfully requested upon several occasions, so to do.

25 18. That at all times herein mentioned, one Samuel N. Wood was, and still is, the president, and together with one David D. Seerie and one Cass E. Harrington, when meeting and acting together, as provided by the City Charter of the said City of Denver, constituted and comprised, and still constitute and comprise, the said Board of Public Works, of said City of Denver, and that one William H. Taylor was, and is, the secretary of said board.

And forasmuch as your petitioner and the said Slayden, Campion, and other signers, were and are without any adequate remedy at law in the premises whatsoever, and cannot protect their several property interests and rights, unless their said written withdrawal be received and placed on file among the records of said Board of Public Works, they will be remedyless, and verily believe and fear they will be irreparably injured.

Wherefore, your petitioner, for himself and on behalf of such other of said parties as shall desire to come in and be made parties to this proceeding, prays an order, decree and judgment to this Honorable court, directed to the said Board of Public Works of the said City of Denver, requiring it to receive the said written withdrawal of signatures from the said petition for paving with Alcatraz as aforesaid, and to place the said withdrawal of signatures upon file in the official records of said board; and for such other order as to the court shall seem meet and proper, and for costs of suit.

Verified by Richard H. Hart.

Notice to Board of Public Works that a peremptory writ of mandamus, as prayed for in the petition, a copy of which was attached thereto, would be applied for on January 26, 1898.

Acceptance of service of copy of foregoing notice, together with copy of petition therein referred to, acknowledged as received by the Board of Public Works on January 15, 1898, signed by David D. Seerie, member of said Board.

Defendants as part of the cross-examination of said witness identified by the witness and introduced in evidence a stipulation dated August 15th, 1899, signed by James H. Brown as attorney for said Richard Huson Hart and the city attorney for the dismissal of said mandamus cause at the cost of said Hart, and also introduced the

order of Court entered on said stipulation dismissing said mandamus cause at the cost of said Hart.

RICHARD HUSON HART, a witness called by plaintiffs, after being first duly sworn, testified: I am the Hart referred to in the
26 mandamus petition and was the plaintiff in that case; that each of the statements contained in the said mandamus complaint are true.

JAMES H. BROWN, re-called, further testified:

Q. After looking at the complaint for mandamus and reading its allegations with respect to that petition or to that withdrawal, can you state from your own recollection independent of the complaint, that there were such withdrawals?

A. The complaint refreshes my recollection. I have read it through and am quite certain that there was a written document signed by the petitioner Richard Huson Hart, and the others, of which the head is set forth in this mandamus complaint. It is found toward the end of and part of paragraph numbered 15 in the petition for the writ of mandamus and read as there stated. That was the heading to which the names were signed and a description of the property following the names, as I remember it.

Q. You as I understand handled that withdrawal petition personally, some time?

A. I didn't handle it altogether, but my best recollection is that I presented that withdrawal to the Board of Public Works at one of their meetings and requested them to act upon it, or file it or to recognize it. I do not know what became of the paper of withdrawal itself, I think it was left there at the office of the Board of Public Works. They didn't order it filed and they refused to consider it; that is why this mandamus suit was brought.

Q. Refreshing your recollection from that petition, can you state the names of the other persons who signed the withdrawal paper besides Mr. Hart?

A. Well, I am quite clear from the allegations of this petition that it was signed by the other persons that are named in here. My present recollection is, that on thinking the matter over, that the petition calling for that paving had not been filed with the Board of Public Works at the time this petition to withdraw was filed with them. I think the paving petition was still in circulation, or at least it hadn't been filed. I think that is one reason we were so anxious to file this petition or withdrawal—why we were so anxious to mandamus them to get it filed. I have no present recollection as to having seen the origional petition for the paving.

Q. By refreshing your recollection from the complaint for mandamus, state about the time it was that you visited the Board of Public Works with the request that they should receive and file these withdrawals, and was refused as you have testified to?

A. Well, it was probably during the month of January, 1898 prior to the filing of this mandamus complaint, or perhaps December 1897. This mandamus petition was filed January 26, 1898 and verified

January 14th, 1898, and I notice in the verification clause the month of December is scratched out, showing the mandamus complaint was originionally dictated in December, so that it is likely that it was in the month of December or else January when the request was made to file the petition of withdrawals. The people who signed it were trying to get the paving petition itself to erase their names from it, and we couldn't get it, and we waited and waited, and that explains the date of this verification clause on this petition for mandamus being written in December. I have that present impression. It comes to my mind in that way; that is my best recollection of it.

SAMUEL N. WOOD, a witness called by the plaintiffs, after being first duly sworn, testified: Was a member of the Board of Public Works from June 1897 to June 1899; David D. Seerie and Cass Herrington were the two other members.

Q. Do you recollect, Mr. Wood, about any withdrawals being filed with the Board of Public Works from the petitions for Eighth Avenue Paving?

A. I remember there were some withdrawals filed, but couldn't state now who they were. I know there were some withdrawals filed from the petition of 8th Avenue, but I wouldn't undertake to say how many; I know there were some I remember that; I should say there were several, but wouldn't undertake to designate how many; I know there was more than one.

DAVID D. SEERIE, a witness called by plaintiff, being first duly sworn, testified: Was a member of the Board of Public Works from June 1897 to June 1 1899. The acceptance of service of that mandasuit is my signature, all right.

Q. Mr. Seerie, as a matter of fact, weren't there withdrawals
27 from the Eighth Avenue Paving petitions presented to your Board from time to time?

A. Yes.

Q. How many?

A. Oh, I couldn't say now; there were quite a number. I remember Mrs. Slayden's withdrawal; I don't remember Campion's or Hart. It was usual, if it was a withdrawal or anything of that nature, it was referred to the City Attorney, and his opinion was followed in the matter.

Q. Hasn't the City Attorney, Mr. Norris, as early and earlier than 1897, advised your board against recognizing withdrawals from petitions after they were presented for paving?

Mr. RITTER: We object.

Mr. GROZIER: We served a notice upon the defendants asking them to produce certain records, among others these withdrawals and the opinion of the City Attorney. I would like to and do hereby introduce that notice so it may go in the record with the acceptance of service on it.

Said notice received in evidence and marked Exhibit "F" and reads as follows:

'District Court.

Case No. 31380.

To the defendants in the above entitled cause and Messrs. Orahood & Ritter, their attorneys:

Please take notice that I request you to produce on the trial of said cause:—

1. The original withdrawal of Emma C. Slayden from the so-called petition for paving in Eighth Avenue Paving District No. 1, with a wearing surface of certain materials, among them naming Bermudez Lake Asphalt.

2. All other withdrawals from the said petition filed with the Board of Public Works.

3. The original withdrawal of Mr. Hart, Mrs. Slayden, Chamberlain and others from the petition for paving Eighth Avenue, which named as a wearing surface one of three materials, among them the Alcatraz Asphalt.

4. All other withdrawals from said petition.

5. All complaints, objections, remonstrances or protests filed against the paving in Eighth Avenue Paving District No. 1.

6. All letters from the city Attorney or other legal adviser of the Board of Public Works, advising the Board not to recognize withdrawals from petitions, and particularly a letter from George C. Norris wherein the Board were advised not to recognize certain withdrawals from petitions for paving in said district. Said communication may have been a general communication not confined to this district only, but relating to all districts, and said letters or communications may have also advised against the permitting of petitioners to file remonstrances against the paving that they had petitioned for.

That upon your failure to produce said original documents I shall introduce secondary evidence as to the contents of same.

JOSHUA GROZIER,
Attorney for Plaintiffs.

Nov. 21/1 Received copy of above.

HALSTED L. RITTER,
Attorney for Defendants.

28 (Last question read.)
A. No, sir.

H. F. MERRYWEATHER, called as a witness by plaintiffs, after being first duly sworn, testified: Am Principal Engineer of the Board of Public Works and have been ever since 1890. Identifies two maps, blue prints, as official maps prepared by the Board in the matter of this 8th., Avenue Paving District, and same are marked Exhibits "G" and "G L" and introduced in evidence.

ALBERT H. WEBER, called as witness by plaintiffs, after being first duly sworn, testified: Am Deputy City Clerk of Denver. Witness produces and there is offered in evidence Exhibit "C," which reads as follows,—

Amended Notice of Completion of a Local Improvement and Apportionment of the Costs Thereof.

OFFICE OF THE CITY CLERK OF THE
CITY OF DENVER, COLORADO,
January 2d, 1900.

Notice to property owners in the "Eighth Avenue Paving District Number One, of the City of Denver."

In pursuance of Ordinance No. 57 of the Series of 1899, of the City of Denver, creating the Eighth Avenue Paving District No. 1 of said City, and authorizing the grading, curbing, paving and other improvements in said District, and of Section 30 of Article VII. of the charter of said City, authorizing and requiring this notice; the owners of all the real estate in said District to be assessed for said improvements, to-wit: All the lots and lands, to their full depth, not exceeding one hundred and fifty (150) feet, abutting on each side of Eighth Avenue from the East property line of Sherman Avenue to the West property line of Lafayette Street, in the City of Denver, and of all the frontage on all the intersecting streets within a distance of one half block in each direction from each intersection of the said Eighth avenue, between said limits, are hereby notified that said grading, curbing, paving and other improvements have been completed and accepted; that the Board of Public Works of said City have prepared a statement, therein showing the whole cost of said improvements, including six per centum additional for costs of collection and other incidentals, and interest to March 1st, A. D. 1900, as hereinafter set forth, and apportioning the same upon each lot or tract of land to be assessed for the same, as by the City Charter provided; and have caused said statement to be certified by the President of said Board, and filed in the Office of the City Clerk of said City.

That the whole cost of said improvements as shown by said statement is the sum of fifty-five thousand, eight hundred and forty dollars and eighty cents ($55,840.80) and that the share so apportioned by said Board to each lot or tract of land is as follows, to-wit:

(Here follows list of lots and lands in said alleged district, with the street and frontage of each thereon, together with the amount of the proposed assessment as in the assessing ordinance set out in the complaint).

That any complaints or objections that may be made in writing by the owners of said real estate, relative to said apportionment, to the City Council and filed with the City Clerk within thirty days of the first publication of this notice (the first publication being on the 4th day of January, A. D. 1900) will be heard and determined by

the City Council before the passage of an Ordinance assessing the costs of said improvements.

And after the period specified in this notice the City Council, sitting as a Board of Equalization, will hear and determine all such complaints and objections, and will by Ordinance assess the costs of said improvements against all the real estate in said District, and as by the City Charter provided.

Witness my hand and official seal the day and year first above written.

[SEAL.] FRANK KRATZER,
City Clerk.

First publication in The Denver Republican January 4th, 1900.
Last publication in The Denver Republican January 15th, 1900.

Q. Were any objections filed by property owners in compliance with that notice; if so kindly produce them?

(Witness produces, there is introduced and marked Exhibits "D" and "E" two papers, which read as follows,—

29 DENVER, COLORADO, *January* 13, 1900.

To the Honorable Board of Public Works and the Honorable Mayor and City Council of the City of Denver:

The undersigned, by Joshua Grozier, their Attorney, do hereby most earnestly and strenuously protest and object to the passage of the contemplated or any assessing Ordinance against the property in Eighth Avenue Paving District No. 1, so-called, for each of the following reasons, to-wit:

1st. That said assessment and all and each of the proceedings leading up to the same were and are illegal, voidable and void, and the attempted assessment if made will be void and uncollectible.

2nd. That said assessment and the cost of said pretended improvement should be collected if at all as a general tax against the city at large and not as a special assessment.

3rd. That property in said city not assessed is benefitted by the said pretended improvement and certain property assessed is not benefitted by said pretended improvement and other property assessed is not benefitted by said pretended improvement to the extent of the assessment; *that the individual pieces of property in said district are not benefitted to the extent assessed against them and each of them respectively;* that the assessment is arbitrary and property assessed in an equal amount is not benefitted equally; that the boundaries of said pretended district were arbitrarily created without regard to the benefits or any other method of assessment known to law; that said assessment is outrageously large.

4th. That each of the laws and each section thereof under which the proceedings in said pretended district were attempted to be had do not confer the authority for such proceedings; that the 1893 City Charter was not properly passed and is not a law of the State of Colorado by reason of not properly or at all passing the legisla-

ture; that each of the provisions of said charter under which said proceedings were attempted are unconstitutional and violative of fundamental principles of law, the Constitution of the United States and the State Constitution or some one or more of the provisions of one or more of the same.

5th. Because the pretended notice of assessment is invalid and was not published in accordance with the law and is in fact no notice at all; because there was and is no valid ordinance creating said district; because each notice required by the 1893 City Charter to be given, where it was attempted to give such notice, was insufficient and was not properly given or properly published.

6th. Because of non-compliance by the contrator with his contract and failure to complete the work in accordance with the contract; because the contract for said work was let without right or authority; because said pretended district is incomplete and the work under said contract has not been completed in accordance with said contract; because items too numerous to mention which were not a proper charge in the said assessment are included therein.

7th. Because the work was done under pretended grants of authority contained in pretended laws, which laws were violative of the constitution and fundamental laws of the state and Union.

8th. *Because the City had no jurisdiction in the premises. No petition subscribed by the owners of a majority of the frontage in the district to be assessed for said improvements was ever obtained or presented.*

9th. Because of delay by the Board of Public Works in attempting to let the contract, and because the said pretended improvement was never properly nor sufficiently petitioned for; because the contracts were not let nor the work done in accordance with the petitions, if any, for the work, and because the city had no jurisdiction in the premises.

10th. Because before ordering the pretended improvement full details and specifications for the same permitting and encouraging competition and determining the number of installments and time within which the costs shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed, together with a map showing the approximate amounts to be assessed, were not adopted by the board of public works before the letting of the contract for the work and furnishing of material; because advertisement for 20 days in two daily newspapers of general circulation giving notice to the owners of real-estate in the district of the kind of improvements proposed, the number of installments and time in which payable, rate of interest and extent of the district, probable cost and time when a resolution ordering the improvement would be considered, was not made either properly or at all, and if ever attempted to be made was not made according*ly* to law or as required by the law or charter.

11th. Because the attempted advertisement for bids on the contract attempted to be let were not properly published and were published and let and the proceedings had, if at all, in such a way as

to be prejudicial to the competition of bidders and to deter bidders; and the completion of the contracts after being attempted to be let was permitted to lag in such a manner as not to comply with the contract, charter or laws, and the power to let the contract attempted to be let was not within the power of the parties attempting to let the same; because the city council is or was by some of the proceedings deprived of legislative discretion and the Board of Public Works and other pretended bodies given such discretion, which discretion they delegated to others having no right or power to exercise the same; and executive functions were conferred on bodies having no right, power or authority to exercise the same and taken away from others to whom such power was attempted to be granted or given or who should properly exercise the same; *that judicial power was attempted to be conferred on the board of public works, so called, and the city council, and other bodies or pretended bodies not judicial or quasi-judicial in character, having no right, power or authority to exercise the same, and the courts attempted to be deprived thereof.*

Wherefore, because of the foregoing and numerous other good and sufficient reasons, the undersigned object and protest against the passage of the said proposed assessing ordinance.

Names. Property.

31 Witness: That is Exhibit "D", the body of it; there are 16 names signed to Exhibit "D"; the names are *Wolfe Londoner*, H. W. Bingham, *Dennis Sheedy*, William E. Howe, Denver Savings Bank by George R. Swallow, President, George R. Swallow, John F. Roberts, William Church, Emma C. Slayden, Ferdinand Bruen, Etta L. Farish, M. B. Carpenter, Richard Huson Hart, William R. Robinson, agent for 8th., Avenue Improvement Society. Exhibit "E" is so far as the body of it is concerned an exact duplicate of "Exhibit "D", but is signed by other persons. Exhibit "E" is signed The Colorado Tax Title & Investment Company, by H. E. Hilts, Secretary, The Arlington Building & Investment Company, by Julius A. Myers, Secretary & Treasurer, and the American National Bank, by Julius A. Myers, President. Exhibit "E" was filed with the City Clerk January 24, 1900.

Q. Will you refer to Exhibit "D", being this other protest, and see what date it was filed in the City Clerk's Office?

A. It was filed on January 26, 1900.

Q. Were there any other protests filed?

A. No sir.

Q. Look at these books—what are these books?

A. Proceedings of the Board of Aldermen and Supervisors of the City of Denver.

Q. Official records?

A. Yes sir.

Q. Take your time Mr. Weber and look at all proceedings of the City Council and each branch of same, from the recommendation by the Board of Public Works of the bill for an ordinance that be-

came Ordinance 57 of 1899 and tell the Court if there is any record of any notice to or proceedings affording property owners to be heard before the Council or either branch, or any Committee?

A. (After examining). There is no such record.

Q. Take book "Q", what is that?

A. Proceedings of the City Council.

Q. I would like to have you read everything that appears there with reference to the 8th., Avenue Paving District; first get back to the beginning?

A. February 13th, 1900, page 1374. '2.30 O'clock P. M. The members of the City Council of the City of Denver met in the Council Chamber of the City Hall in response to the following communication from the Mayor: Denver, Colorado, February 9, 1900 I am informed by the Board of Public Works that there are several assessment districts, towit; Fourteenth Street Viaduct, Champa Street Paving District No. 1, and Eighth Avenue Paving District No. 1, now awaiting the action of the City Council, sitting as a Board of Equalization, (see general section 188 City Charter) to consider any protests which may have been filed against such assessments. It is very important that these matters be acted upon as soon as possible.

You are therefore requested to meet as a Board of Equalization in the Council Chamber at City Hall, at 2 o'clock P. M., Tuesday, February 13th instant, to take such action with reference to these matters as your Board may deem best.

Respectfully, H. V. JOHNSON, *Mayor.*"

Q Do you know Mr. Weber, whether that was in fact signed by the Mayor before the call was sent out?

A. Yes sir—I don't know, but I assume it was.

Q. You didn't know—you at that time weren't the party who made these minutes?

A. No, I wasn't there, but I looked it up.

Q. In whose handwriting are these?

A. Mr. Peter Koehler.

Q. He at that time was writing up the records in the City Clerk's office?

A. Yes sir.

Q. What is the usual method of calling a meeting of the City Council as a Board of Equalization?

Objected to because the City Charter provides.

32 Q. I will ask you who were present at that meeting?

A. Present: Supervisors Canon, Uzzell, Wilson, and Filius —all the Supervisors were present.

Q. There are five Supervisors?

A. Yes sir; and Aldermen Alexander, Bailey, Bennet, Conlon, Kelly, Lathan, Murray, Phillips, Scanlon, Golder,—14.

Q. How many Aldermen were there at that time, if you know?

A. I think there were 15 or 16. There were absent Supervisor Mitchell and Aldermen Campion, Cannon, Cherry, Currigan, Petrie and Tebbetts. There were six Aldermen absent and one Supervisor.

Q. Will you read this over again, reading those absent and present?

A. Present: Supervisors Canon, Uzzell, Wilson and Filius; absent was Supervisor Mitchell. Present: Aldermen Bailey, Alexander, Bennet, Conlon, Kelly, Lathan, Murray, Phillips, Scanlon and Golder; absent Aldermen Campion, Cannon, Cherry, Currigan, Petrie and Tebbetts—six Aldermen absent and one Supervisor.

Q. Were there any proceedings had on the Eighth Avenue Paving on that day?

A. Yes sir.

Q. There were?

A. Yes sir.

Q. Read them?

A. "Supervisor Filius offered the following:

Whereas, Complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth Avenue Paving District No. 1, of the City of Denver against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the City Clerk; and

Whereas, No complaint or objection has been filed or made against the apportionment of said assessment made by the Board of Public Works of the City of Denver, but the complaints and objections filed deny wholly the right of the City to assess any district or portion of the assessable property of the City of Denver; therefore, be it

Resolved, By the City Council of the City of Denver, sitting as a Board of Equalization, that the apportionments of said assessment made by said Board of Public Works be, and the same are hereby confirmed and approved.

The resolution was adopted by the following vote: Ayes, Canon, Uzzell, Wilson, Filius, Bailey, Bennet, Conlon, Kelly, Lathan, Murray, Phillips, Scanlon, Golder, (13), nays, none."

Q. That was acting on those protests?

A. Yes sir.

Q. And the only action had on those protests which have been introduced in evidence?

A. The only action had, yes sir.

Q. And that was the only action had that day on the Eighth Avenue pavement?

A. Yes sir.

Q. Or since?

A. Yes sir.

Q. I think that is all, except you couldn't find the call?

A. The call, the City Attorney had—that particular call that you refer to.

33 PETER KOEHLER, a witness called and sworn on the part of the plaintiffs, testified as follows:

Direct examination.

By Mr. GROZIER:

Q. Mr. Koehler, you were in Court while Mr. Weber was on stand, were you not?
A. Well, not all times.
Q. While he read about that Board of Equalization?
A. Yes sir.
Q. What do you remember about the call for that meeting?
A. There was a call issued for a joint meeting of the Board of Aldermen and Supervisors.
Q. Was that call signed by the Mayor at the time it was issued?

Mr. RITTER: If your Honor please, it appears from the records that it was signed, and the record was introduced by the plaintiff. Therefore I object to this as tending to contradict the evidence already introduced by the plaintiffs, and as not the best evidence in support of the facts sought to be brought out.

Mr. GROZIER: The question I want to ask is, was that call signed by the Mayor until after the meeting was held. I don't see that it is contradicting anything that we have gone into. The record shows, when that record was made, it was signed, but that is all it shows. It don't show the call had been signed.

Q. (Last question read)?
A. Well, I think I would have to make a little explanation in regard to that. I testified in the case—the Viaduct case the other day, and I wasn't quite sure about it, but Mr. Grozier testified to being in the office at the time, and I am almost positive that was the time. The notice was not signed by the Mayor and I called the Clerk's attention to it, Mr. Kratzer, and he told me *and* have it signed. It was brought down after the meeting, and I separated my papers as they appeared from the short notes, so as to have them in rotation to write them up, and when I looked at the call, I called his attention to it, it was not signed and being so very few meetings of the Board of Equalization, I am quite positive this was the particular meeting, after refreshing my memory after the last trial of the Viaduct case.
Q. At that time, Mr. Koehler, what was your official position?
A. I was the record clerk.
Q. In the City Clerk's office?
A. Yes sir.

Cross-examination.

By Mr. RITTER:

Q. This notice that you say wasn't signed, was a copy of a notice that was sent out?
A. No, the notices sent out are copies, and one we keep—we keep the original.

34 Q. And you don't know whether the notices that were sent out were unsigned or not?

A. No, sir, I couldn't tell you that.

Q. So a notice, that is a copy of the call, is served on each Alderman and Supervisor?

A. Yes, sir, personally, or upon his family.

Q. You don't know as a matter of fact whether or not those notices that were served on the Aldermen and Supervisors, were signed by the Mayor or not?

A. No, sir, I wouldn't say that they was.

Q. What you are now testifying to is, that the copy which you used to make your entry here, was not signed?

A. Mr. Ritter, it was not a copy. I used the original and that is filed away.

Q. But it might have been that the original wasn't signed, but the others might have been?

A. The others might have been, I couldn't say as to that; of course I didn't serve them. There was an officer served them.

C. K. INGHAM, a witness called by plaintiffs, after being first duly sworn testified; have been actively engaged in real-estate business ten years; am familiar with realty values in this paving district and the city generally.

Q. Are you familiar with the condition that exists on the north side of 8th, Avenue with respect to there being a small strip of land that varies in width from 4.8 feet in width to as wide as 18 feet?

A. Yes; I know there is such a strip there, on deals that I have made when the outlot is deeded with the other; but as to the size of it I don't exactly remember; but I know there is a small strip there; without the adjoining property the strip where but 4 feet wide is valueless or nearly so. As speculation to hold up somebody the small strips might be worth $100; as the strips get wider they have more value of course.

By Mr. RITTER:

Q. Now Mr. Ingham, in every instance you have testified about here, with reference to the property and the value, you would say that the value you have fixed on it, is the value plus the assessment?

A. Yes, sir.

Q. So that the assessment that is made against this property by reason of the pavement, has added to the value, that specific amount?

A. Yes, sir.

Q. And therefore you would say that the assessment against these lots represented, in amount, the special value of that pavement?

A. Well, I have given facts—I have given the value of the property at a time later and the time before. Now, I wouldn't say that it would be all that—I would say that part of that was due to better times, the increase in value or was due to the pavement.

Q. But in each instance you have testified to, you said that the property was bought or sold, the purchaser assuming the assessment?

A. Yes, sir.

Q. So that as far as you know, from your information, from your dealing, your knowledge of value of the property that you testified about, after the pavement was put down, the property sold for as much more as the assessment was made against it?

A. No, they didn't sell for as much more as the assessment was against it. My figures don't make it.

Q. You testified that property was sold for $500.00, the purchaser assuming the assessment, and their values were subject to the assessment, didn't you?

A. Yes, sir, but here——

Q. Don't you mean by that, that the purchaser assumes to pay the assessment?

A. Yes, sir.

Q. Over and above the specified price of purchase?

A. Yes, but the values that was made—now, for instance, take—when I fixed the values for him, as the price that they were worth now, I wasn't speaking of that—the price was worth $500.00, where they was worth, say a thousand, before, was that they was to pay the assessment; not what they have sold for, but these that I have specified being sold at different prices—for instance, this is offered for sale at $4,500.00 now.

Q. Plus the assessment?

A. Yes, sir.

Q. Do you know of a sale having been made since that thing was put down, where the purchaser did not buy the property and assume to pay the assessment, or where the property was sold with the assessment added into it—the selling price?

A. Yes, there was these eight lots here, they belong to the Denver National Bank, the Bank paid the assessment on them; that was the one I was told of, in block 23.

Q. The Bank paid the assessment and sold for how much?

A. Sold the eight lots for $4,500.00.

Q. Did that $4,500.00 include the assessment?

A. Yes, sir, that included the assessment and all.

Q. What was the value of the property outside of the assessment?

Mr. O'Donnell: It was before the pavement was made, you mean?

Q. You are now testifying to a sale before or after the pavement?

A. I am talking now about the sale after the pavement.

35 Q. How much was that property worth then, leaving the assessment out?

Mr. O'Donnell: You mean by that, before the pavement?

Q. I mean less the assessment?

A. At the time the sale was made?

Q. Yes, sir?

Mr. O'Donnell: I submit that is not a proper question.

The Court: The witness may state what, in his opinion, the value of those lots were.

A. That would be merely my opinion. All I could give you about

that, Mr. Ritter, would be to give you my opinion of what that paving is worth.

Q. Now let me ask you this—if that pavement had not been there, then those lots would have sold for less than $4,500.00, wouldn't they?

A. Yes, I suppose they would.

Q. So that $4,500.00 represents the price of that property with the improvements added?

A. Yes, sir.

Q. And you say that these lots on 8th and Marion, that was sold for $500.00 plus the assessment, were snaps?

A. Yes, sir.

Q. You mean by that——

A. That is they was considered that. They have not been able to sell them since for a raise, though.

Q. Isn't it a fact that all the property you have testified about that is not sold, but is for sale, is for sale for a price which includes the assessment, or the purchaser may buy and assume the assessment?

A. Yes, sir, they are for sale either way, or take it subject to the assessment.

Redirect examination.

By Mr. O'Donnell:

Q. Take this Denver National Bank property you speak of having been sold for $4,500.00, what was that property worth before the paving?

A. Before the paving it was worth about $500.00 a lot, as I testified before, which would be $4,000.00.

Q. Now, how long after the pavement had been down, was it sold?

A. Well, it was sold in March, 1900.

Q. The pavement had been down a year and a half or so?

A. I forget just the dates of the paving.

Q. Now, in the meantime, the values had increased for other causes besides the pavement?

A. Yes, sir, they had.

Q. How much of the increase in the value of $500.00 on those lots, was due to pavement and how much to other causes?

A. I consider that property in Denver, located as that—located up in there, has increased outside of any public improvement, has increased at least ten per cent. in the last two years.

Q. So that would leave $400.00 by reason of general conditions, and $100.00 by reason of the pavement upon it?

A. Well, that is just a matter of fact.

Q. Now, as a matter of fact that section of the country has been building up and the town has been growing in that direction and it is coming nearer to the built-up part of the town?

A. Yes, sir.

Q. And that building has been going up in a part nearer to the town which is unpaved, isn't it?

A. Yes, sir, and building is away from the paving.

Recross-examination.

By Mr. RITTER:

Q. Isn't it a fact that the putting of that pavement up there gave an impetus, somewhat, to the sale of property, and started building and sales?

A. Why, yes, I think it started sales; I think it had some effect in that way.

Q. So that street itself has been of some benefit to all the property up there in that part of the City?

A. Yes, sir, I think it had.

Q. Now these values that you fixed and the amount of benefits, are your ideas. Other men will differ with you?

A. Oh, undoubtedly.

By Mr. O'DONNELL:

Q. And when you speak about the pavement being a general benefit to other property, you mean it has been of benefit to property outside of the paving district, but in the general neighborhood, do you?

A. I mean, beyond the end of that paving, for instance, a block or two from it, and such as that, that have paid for no benefit at all, have been benefited, for it started up the building in that direction, beyond, more than it has right on the paving itself.

Q. As a matter of fact, hasn't it benefited the property as much all the way between 8th and 9th Avenues, as it has that property between 8th and 9th Avenues, which is assessed?

A. Well, the people that own the half block that is set off from there, have made more profits than the ones that were within the paving district.

HORACE W. BENNETT, being first duly sworn testified for plaintiffs,—Have been in real-estate business in Denver over 17 years and am familiar with realty values in this district and all over it, having bought and sold a great deal of property in it, I am pretty familiar with it.

Q. On the north side of 8th., avenue running at least from Sherman avenue east, immediately north of 8th avenue there is a small strip of land? By reference to this map you can tell, can you not, that this strip runs right through?

A. Yes, sir.

Q. You were familiar with the values of that property prior to the time of the paving were you not?

A. Yes, sir, we traded in property along there and were familiar with them.

Q. How much was the value increased, of those strips,
36 after the paving was laid, over what it was just prior to the paving?

A. That would be hard to determine. You mean—just on—in the nature of conditions it could not advance the price of the prop-

erty. The property is more valuable now than it was before the paving—naturally more valuable; everything has increased.

Q. Assuming that the same conditions existed, with no paving down to-day and paving down to-morrow, or no paving yesterday and paving down to-day?

A. Well, I don't think those lots had any material value anyway, even now, without any other ground to go with them. I wouldn't think they were more than $200 per lot, not large enough to build on.

Q. Take lot 17 in block 13 Arlington Heights, being 10.48 feet wide by 125 feet long?

A. That would be a very small strip; I don't think it would be worth over twenty-five dollars.

Q. You know the value of each of these strips before the paving was laid?

A. Well, you mean how much it would increase it by the paving?

A. Yes, how much?

A. I don't think it would increase it any. I don't see how it could; the strip is not good for anything without it goes with other lots.

Q. It has some speculative market value?

A. If you sell it with the other lots it would be worth something.

Q. Suppose it stood alone, wouldn't it have some value—wouldn't it find a market?

A. No sir, I think not. Little strips like that have been sold for taxes where they are of no value; that is true next to the park, 2 or 3 feet wide, nobody would give anything for them.

Cross-examination.

By Mr. RITTER:

Q. Mr. Bennett, would you say this pavement has been a special benefit to property generally in that district?

A. Oh, I think it helps property, yes, sir, to a certain extent.

Mr. O'DONNELL: It has helped property outside of the district as well as property in the district?

A. Yes sir, for instance—let me qualify that, by stating, if a man has a property by the City Park and builds a block, he has the same benefit of the paving as the person who has helped pay for it.

Q. That is true of all improvements, some people have to pay for it and others don't and still get the benefit of it?

A. That seems to be the unfair part of it.

Q. Out-lot 50 that lies immediately South of block 21 Inslee's Addition, a strip 4.8 feet, by 125 long?

A. That has no value whatever, unless it goes with other property.

Q. And the same is true of out-lots 51, 52, 53 and 54?

A. Yes, they are all about the same, about four feet?

Q. How about lot 18 in block 12, Arlington Heights, being 10.86 wide by 125 deep?

A. That would be a very small strip, I don't think it would be worth over $25.00.

Q. Take lot 17 in block 13 Arlington Heights, being 10.48 feet wide, by 125 feet long?

A. That would be about the same.

Q. Take Londoner's property 12 to 15 Block 130 South Division of Capitol Hill.

A. That is worth about $500 per lot. It is at 8th & Clarkson.

Q. Take Sheedy's lots 13 to 17 in Block 13 Emery's Capitol Hill, next to corner 8th & Pennsylvania?

A. About the same, $500 per lot.

37 On December 31, 1901, the trial judge, after hearing all the evidence and testimony, made the following findings and filed the following written opinion in said cause:—

"MALONE, *Judge:* The Court has endeavored to enter upon the consideration of these cases with the spirit of the greatest liberality mentioned by Judge Gunter of the Court of Appeals in a decision of said Court recently rendered in the case of Dumars *vs.* The City of Denver; and while this court is not at all in favor of the practice of allowing taxpayers or property owners whose property has been more or less improved or benefited by public improvements to avoid and evade paying a just and reasonable proportion of the cost of said improvements on mere technical grounds the court has not been able to escape the conclusion and conviction that municipal authorities in too many of these public improvements, proceed without regard either to the rights of property owners or to the plain, specific and jurisdictional requirements of the charter.

The desires and interests of rival and contending paving companies seem to have been more controlling than the wishes of interested property owners, and more controlling than a careful regard for the requirements of the charter or the law applicable to such matters. I find each of the allegations of the complaint true. Much as I regret the necessity, the court is compelled to find the issues herein in favor of the plaintiffs, and plaintiffs attorney may draw decrees accordingly.

If the defendants desire, a motion for a new trial may be filed and considered overruled, and defendants may have 90 days for a bill of exceptions."

Decree of District Court in favor of plaintiffs presented on January 6, 1902, to the Court for signature. Defendants in open Court object to the signing of decree because it is contrary to the law and the court is without jurisdiction to sign any decree in favor of the plaintiffs. Objections of defendants overruled by the Court, to which ruling of the Court defendants then and there duly excepted. Decree signed by the Court in favor of the plaintiffs, and appeal prayed by defendants to the Supreme Court of the State of Colorado; 90 days' time given for a bill of exceptions.

Said decree, omitting caption, was in — following words and figures,—

"Now on this day come the plaintiffs Wolfe Londoner and Dennis Sheedy, by Joshua Grozier, Esq., their attorney, and also come the defendants by Harper M. Orahood, Esq., and Halsted L. Ritter, Esq.,

their attorneys herein; and this cause having come on regularly for trial before the Court without the intervention of a jury upon the pleadings herein and upon the evidence and testimony adduced, and the court having heard said evidence and testimony and the arguments of counsel, and having taken said matters under advisement, and being now duly and fully advised in the premises doth find each of the issues of fact and law herein joined in favor of each of the plaintiffs, and that each of the plaintiffs is entitled to the relief demanded herein; that the lien and cloud of the pretended assessment in Eighth Avenue Paving District No. 1 of the City of Denver, so-called, be and the same hereby is removed from the titles of the plaintiffs to their various properties in the complaint mentioned, and from none other of the titles in said pretended district, and that the said lien and cloud be and the same hereby is removed and declared null and void as to each of the following pieces of property which were owned at the time of the commencement of this action or are now owned by the parties hereinafter stated, all being situate in the said pretended Eighth Avenue Paving District No. 1 in the City of Denver, in Arapahoe County, Colorado, to-wit:—

38 Lots numbered Twelve (12) to Fifteen (15), both inclusive, in block numbered One Hundred and Thirty (130) in South Division of Capitol Hill, owned by Wolfe Londoner.

Lots numbered thirteen to seventeen both inclusive in block thirteen in Emery's Capitol Hill Addition to the City of Denver; fractional lot Seventeen (17) in block Thirteen (13) in Arlington Heights Addition to the City of Denver, and out-lot fifty (50) in South Division of Capitol Hill, owned by Dennis Sheedy.

That the line and cloud of the said pretended assessment be and the same hereby is removed from the titles to each of the foregoing mentioned pieces of property and none other in said so-called district; that the temporary injunction heretofore issued in said cause be and the same hereby is made perpetual;

And the court doth further order that each of the plaintiffs herein do have and recover of and from the defendants their several costs herein to be taxed and that they have execution therefor.

Done at Denver, Colorado, this 31st day of December, A. D. 1901.

By the Court.

BOOTH M. MALONE, *Judge*.

Appeal prayed by defendants to Supreme Court; granted; ninety days given for bill of exceptions. Certificate of Clerk of District Court.

April 4th., 1902, bill of exceptions duly tendered, signed and sealed by trial judge and filed in the office of the Clerk of said District Court.

The foregoing record and bill of exceptions, duly certified to by the Clerk of the District Court of the Second Judicial District of Colorado, with the seal of said Court attached thereto, with Assignment of Errors by defendants attached, duly filed in the office of the Clerk of the Supreme Court of the State of Colorado on April 4, 1902.

May 2nd., 1904; cause orally argued in the Supreme Court of the

State of Colorado, by counsel for said Appellants and said Appellees.

November 7th., 1904, said Supreme Court of Colorado hands down and files its opinion reversing said cause. Said opinion appears in full in volume 33 Colorado Supreme Court Reports pages 104 to and including 121, and is in words and figures as follows,—

39 No. 4488.

THE CITY OF DENVER ET AL., Appellants,
vs.
WOLFE LONDONER ET AL., Appellees.

Appeal from the District Court of Arapahoe County.

Chief Justice GABBERT delivered the opinion of the court:

Appellees, as plaintiffs, brought an action in the court below, the purpose of which was to annul assessments levied upon their property to pay the expense of paving certain streets in what is known as the Eighth Avenue paving district, in the city of Denver. From a judgment in their favor the defendants appeal. The questions presented for consideration are substantially as follows:

1. The sufficiency of the petitions by the property owners.
2. The legality of the publication of the ordinance creating the district.
3. The sufficiency of the notice to owners published by the board of public works.
4. That the charter provisions do not provide for due process of law.
5. That specific tracts were not benefited, or the assessments thereon were excessive.
6. The validity of the law creating the board of public works.

1. By the pleadings filed on behalf of the plaintiffs in the court below the sufficiency of the petitions by the property owners was questioned as a fact, in that it was pleaded that a majority of such owners had not signed the petitions requesting the paving of Eighth avenue. The charter provide that the board of public works may order the grading, curbing and paving of any street, provided, however, that the owners of a majority of the frontage to be assessed shall petition therefor.—Subdivision 3, section 3, article 7 (section 160), Charter. It is no doubt true that conditions precedent which the law points out shall be observed by city authorities in ordering improvements must be complied with, and that as a general rule their failure to do so does not give them jurisdiction to proceed. This general proposition, however, is not applicable to this case. The proceedings to pave the streets in a given district are to be initiated by the board in the manner indicated, but it is left with the city council to finally pass the ordinance creating the paving district. In performing this function it is left to that body to determine whether or not certain preliminary steps which the law requires to be taken by the board of public works have been complied with. The law further

provides that the finding of the city council by ordinance that a petition was or was not on file, or was or was not subscribed by the required number of property owners, shall be conclusive in every court or other tribunal. In the ordinance creating the paving district the city council did find, as a fact, that petitions for paving the street subscribed by the owners of a majority of the frontage to be assessed for paving the street in the paving district were presented to the board of public works. It is only because of the provisions of the charter that a petition by the owners of property must be addressed to the board of public works before the latter are authorized to take the preliminary steps to pave the streets. The owners are not entitled so to petition by the fundamental law. The legislature might have dispensed with this prerequisite. The board of public works, it is true, would be without jurisdiction to take the preliminary steps in the absence of such petition, and no doubt, in such case, up to the time when the city council acts upon their recommendations as to the creation of a paving district and determines that the necessary petition subscribed by the owners has been presented to the board of public works, the latter could be enjoined from presenting any recommendation to the city council; but there is a stage in the proceedings when the question of the sufficiency of the petition and the number of owners subscribing it is no longer open, if the city council, in passing the ordinance creating the district, has found the facts from which it can be inferred that the law in this respect has been complied with. This is a matter which the legislature in its discretion, has the authority to commit to the finding and determination of the city authorities. Such a law is not unconstitutional because it does not deprive property owners of any rights which they are entitled to assert under the fundamental law of the state, and hence, the legislature has the authority to say at what time and by what body the findings of fact as to certain preliminary steps of the nature under consideration shall become final and conclusive.—Dumars *vs.* City, *supra;* 2 Dillon, 4th Edition, section 800; Dennison *vs.* Kansas City, 95 Mo., 416.

In brief, the findings of fact by the city authorities as to those matters which are not inherently jurisdictional are conclusive when the law authorizes them to determine such facts, and provides that their findings thereon shall be conclusive.

In Dennison *vs.* City, *supra*, the charter provisions of the city under consideration provided that notice to owners should be given before findings of fact with respect to certain matters could be made. It was held that a hearing under these provisions must be afforded the owners, but the opinion distinctly holds that the legislature could have conferred upon the city authorities the power to improve the streets of the city at the cost of the property owners without requiring the preliminary steps referred to. It further recognizes that the findings of fact by the city council as to those matters committed to that body by the law are conclusive.

The many authorities cited by counsel for appellees to the effect that a failure upon the part of the city authorities to comply with prescribed preliminary steps renders the proceedings void are not in

point. They are based upon the proposition that the steps prescribed must be observed, otherwise jurisdiction does not attach. Unlike the case at bar, however, they were decided in states where there was no provision of law whereby the findings of the city authorities that the preliminary steps had been taken were conclusive.

2. The ordinance creating the district was published on Sunday. This publication was not illegal, for the reasons given in deciding this same question in Dumars *vs.* City, *supra.*

3. Subsection 2, section 3, article 7 (section 160), Charter, requires the board of public works to give a specified notice before ordering improvements. This notice must be published for twenty days, notifying the owners that any complaints or objections to the matters contained in the notice that may be made in writing by the owners and filed with the board within thirty days from the first publication of such notice, will be heard and determined by the board. In case at bar the thirty days expires on Sunday, and by the terms of the notice, the complaints and objections contemplated were to be considered and determined by the board on Monday following. The time fixed under the notice for the hearing and determination of the complaints and objections which might be presented to the board was not premature. The charter requires, when the notice so specifies, that the owners must lodge their objections with the board within thirty days from the date of the first publication. There is no provision excluding any Sunday of such period. Where a statute declares that an act shall be done within a certain number of days, Sunday must be reckoned as one, though it happens to be the last, unless expressly or impliedly excluded.—Vailles *vs.* Brown, 16 Colo., 562; *Ex parte* Dodge, 7 Cowan, 147.

The Code provision, section 382, has no application. That refers solely to the matter of computing time within which an act is to be done, as provided in the Code, with respect to procedure in courts of record.

4. The general question, that the provisions of the charter give the owners an opportunity to be heard touching the assessments, has been discussed in the preceding cases of City of Denver *vs.* Kennedy, *ante* * * *, and City of Denver *v.* Dumars, *ante* * * *; so that we shall not enter upon a further discussion of that question in the present case, except in so far as it relates to the proposition that because the judgment of the city council is not final, but is subject to the revision of the board of public works, the owners of property in a local improvement district are not afforded an opportunity to be heard touching the validity of an assessment, which the constitution requires. In discussing this question considerable stress seems to be laid upon the language of the court in the case of Brown *vs.* City of Denver, 7 Colo., 305, wherein it is said that the hearing contemplated must be "before a board or tribunal competent to administer proper relief." From the language it is argued that because the judgment of the city council is not final, but its action is subject to revision by the board of public works, that therefore it is not a competent tribunal. The word "competent," as employed in the Brown case, does not convey any such meaning, but, rather, that the tribunal

which the law designates shall be suitable and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The main purposes of affording an owner a hearing upon the question of assessing his lands for special benefits, are to give him the opportunity to be heard upon the quantum of the tax which may be assessed upon his land as well as its validity. If this hearing is afforded at some stage of the proceedings, he is given the opportunity to be heard which the fundamental law contemplates. The Supreme Court of the United States, in Bauman *vs.* Ross, 167 U. S., 548, in discussing the question of what constitutes due process of law under statutory provisions, for assessing the cost of public improvements to the owners of land benefited thereby, says, at page 590:

"If the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice by publication or otherwise to each owner of land, and for hearing him at some stage of the proceedings upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

Under that authority the provision for the hearing before the city council satisfies the requirement of the constitution with respect to due process of law. The owners are afforded full opportunity to be heard touching the question of the apportionment of the special tax upon their property before the levy is finally made. The remedy thus afforded them is appropriate, and the tribunal designated to hear their complaints and objections is a suitable one, and legally qualified to act.

5. Along 8th., avenue strips varying from 4 to 19 feet in width were assessed for the paving as much as a thousand dollars. The charter provides that the expense of paving shall be assessed upon all the lots and lands abutting on the street improved in proportion as the frontage of each lot or tract of land is to the frontage of all the lots and lands so improved, with this proviso; that where the real estate abutting on the street improved consists of lots which are not of substantially equal depth, then the same may be assessed to a substantially equal depth not less than 20 nor more than 150 feet from the street improved as the same may be determined by the board of public works. Sec. 4, Art. 7 (Sec. 161), Charter. The contention of counsel for appellees, that those strips being less than 20 feet in width could not under the charter be assessed at all is not tenable. The provision of the charter above referred to was for the purpose of enabling the city authorities to assess lots or strips of less than 20 feet in width in an equal manner. The provision of the charter as to the general method which shall be employed in apportioning assessments is *prima facie* valid. City of Denver *v.* Knowles, 17 Colo. 204—but where such rule works an injustice, relief in proper circumstances may be granted. None of the appellees, however, are in a position to invoke relief at the hands of the courts because of the alleges excessive assessment on these strips. Those whose property has been assessed which is of substantially equal depth cannot complain of the alleged excessive assessment on the strips, because

no unjust burden is thereby imposed upon them. They cannot take advantage of a wrong against an owner which does not affect their rights. The owners of the strips are not entitled to any relief in the suit instituted by them, because the assessment against their property is not void, but merely erroneous by being excessive. They cannot escape taxation altogether because the amount assessed against their several tracts is greater than it should be. Notwithstanding this alleged error, they are bound to pay what would be just and equitable. The amount which would have been proper to assess against those strips should have been tendered to the proper authorities before bringing a suit to annul the alleged excessive assessment. They made no such tender, and are therefore not in a position to maintain this action, or have the question litigated as to what would be a proper amount to assess against those strips. City of Denver *v.* Kennedy, ante.

6. The constitutionality of the law creating the board of public works in the city of Denver was determined by this court *In re* Senate Bill, 12 Colo. 188. The questions submitted to the court for determination in that matter were (1) whether such board could be appointed by the governor; and (2) whether the general as-
41 sembly could so amend the charter which confers upon the board the power to expend the money of the city in making public improvements. Both these questions were answered in the affirmative, and the bill declared constitutional. In passing upon these questions the court held that municipal corporations are creatures of legislative enactment, and that the legislature, in the absence of inhibitory constitutional provisions, has the plenary power to adopt such measures as shall, in its judgment, be most conducive to their efficiency and usefulness; that there was no constitutional provision withholding from the general assembly the power to authorize the appointment by the governor of the members of the board of public works; that section 35, article 5, which prohibits the general assembly from delegating to any special commission power to make, supervise or interfere with municipal improvements, did not apply, because the board of public works under the law would become an integral part of the city government. No decision has since been rendered by this court which in the slightest degree conflicts with the conclusion reached in the case, or the reasoning adopted. The court did say, however, in effect, in upholding the constitutionality of the bill, that it must not be misunderstood as deciding every direct legislative interference with local municipal affairs would be free from constitutional objection. It is now argued that the authority conferred upon the board of public works as evidenced by the details of the bill, as enacted in 1893, when the charter of the city of Denver was amended, is objectionable because thereby the people of the city of Denver are deprived of the power to control their affairs with respect to local improvements in which the state has no interest. If the board of public works is an integral part of the municipal government, that objection is certainly made not tenable, except it be upon the theory that the details of the charter defining the powers of

the board of public works have entirely deprived the municipal authorities elected by the people from any control over local improvements in which the state has no interest. An examination of the provisions of the charter respecting public improvements in which the board of public works has a voice, so far as called to our attention, demonstrates that the board is not omnipotent, as claimed, but that the municipal authorities, elected by the people of the city of Denver, are clothed with such authority that the board is powerless, without the sanction of the council. The charter provides that in directing public improvements certain initiatory steps, varying according to the character of the improvement, shall be taken by the board. When these proceedings have reached that stage where the board has concluded that in its judgment the improvement should be ordered, it recommends an ordinance which, however, can only be passed by the city council. It is not obligatory upon the latter to pass such ordinance. If, after considering the necessity of the improvement, the cost thereof, and the materials which are to be employed in its construction, the district to be assessed with its expense—in short, any and all matters relating to the improvement, it is of the opinion that the improvement should not be made for any reason, it is in the discretion of the council to refuse to pass the ordinance. If such ordinance is passed by the city council the contract for the work is not let by the board of public works, but by the mayor. When the work is completed it devolves upon the board of public works to make a preliminary apportionment of the expense on the property benefited thereby. As to certain improvements the legislature has directed how such apportionment shall be made. This, however, is not the levy of a tax by the general assembly, but merely a rule adopted by that body for the apportionment of the cost of an improvement by the municipal authorities. This apportionment is certified by the board and filed with the clerk. The latter is then required to give notice to the owners of property to be charged with the expense of the improvement to file such complaints and objections touching the apportionment made as they may be advised. These objections are to be heard and determined by the city council, and it is only after they have passed upon such objections as the owners may have interposed to the recommendation of the board of public works on the apportionment of the cost of the improvement that the city council is authorized to pass the assessing ordinance which makes the apportionment a lien upon the property chargeable therewith. This action constitutes the levy. So it appears that at all times the board is powerless to order any improvements, create a district, or levy assessments, but that all these matters are left to the action of the city council. But it is argued that in reality and to all practical intents and purposes, it is the board of public works, and not the city council, which makes the assessment, because of the provisions in the charter (section 31, article 7) which counsel for appellees insists leaves the city council without any discretion in passing the assessing ordinance after the recommendation of the council has been reviewed by the board. Notwithstanding the apparently mandatory words employed in section 31 *supra,*

we do not think that thereby the legislative power and discretion of the city council is taken away and vested in the board of public works, but that the former, in the exercise of its functions, is empowered to pass an assessing ordinance charging property with the cost of an improvement, which, according to its judgment, would be just and equitable.

In the case of Board of Co. Comm'rs *vs.* Smith, 22 Colo., 534, it was held that "may" must be considered as "shall" when an act of the legislature can be thereby upheld, if a contrary construction would render it obnoxious to a constitutional inhibition. The converse of this must be likewise true, and hence we conclude that if the provisions of section 31 are objectionable because apparently mandatory upon the city council, they do not strip the latter of the legislative authority and discretion, but still leave it with the authority to pass an assessing ordinance in accordance with its own judgment. So far as urged upon our attention, we find no provision of the charter relating to the board of public works or local public improvements which are unconstitutional.

It will not be practicable to attempt a review of the many authorities cited by counsel for appellees in support of their claim that the board of public works is an unconstitutional body. In considering those cases, it must be borne in mind that the provisions of state constitutions other than our own were being considered, while in this instance it is our own constitution which is under consideration. The leading case on the subject, and one which has been referred to many times by the courts of last resort is The People *vs.* Hurlbut, 24 Mich., 44. In that case the validity of the law creating the board of public works of the city of Detroit were considered. A law had been enacted by the legislature which vested the appointment of such board outside of the municipal authorities. The particular provision of the constitution under consideration was to the effect that certain officers of cities should be elected, and that all other officers should be elected or appointed at such time and in such manner as the legislature should direct. Under this provision the court held that the power to appoint such officers as were required to be elected must be lodged with the city authorities. That conclusion appears to have been reached upon the theory that the constitution of the state of Michigan contemplated, except as to matters in which the state had a direct interest that the government of cities was vested exclusively in the municipal authorities. Whatever the general provisions of the constitution of the state of Michigan may have been upon which this conclusion was based, is immaterial, because it was held in this state, when the senate bill providing for a board of public works in the city of Denver was considered by this court, that there was no inhibition against the appointment of such board by the governor, if so authorized by the general assembly.—Section 6, article 4, Constitution. We know of no reason why this view should be changed, especially when it appears that the municipal authorities of the city, elected by the people, do, in fact, control local public improvements by virtue of the charter provisions relating to the same.

Another case frequently cited is The Board of Park Commissioners *vs.* Common Council of Detroit, 28 Mich., 228. That case has no application whatever to the present one. It was there held that the legislature had no authority to dictate to a city what local improvements should be constructed in which the state had no interest. From an examination of the case, it appears that an act of the legislature had conferred upon commissioners authority of such character with respect to certain improvements that the duties of the city council as to these improvements were merely ministerial. The gist of the decision was that the act of the legislature was, in effect, a dictation as to what improvements should be constructed. No such question as that is involved in the case at bar.

In the case of State *vs.* The Mayor of Des Moines, 103 Iowa, 76, it was decided that the act of the legislature of Iowa in conferring upon the board of library trustees appointed by the municipal authorities the power to fix absolutely and beyond the control of the council the amount of taxes to be raised for library purposes, was unconstitutional, because the legislature had no authority to delegate the power of taxation for strictly local municipal purposes to a body of persons not elected by the people. By authority of that character — is attempted to be conferred upon the board of public works of the city of Denver.

Many cases upholding our conclusion that the charter provisions considered are constitutional might be cited, which go even further than we do with respect to the control of municipal corporations by the general assembly. Among these we cite Brown *vs.* City of Galveston, 75 S. W., 488, and Riddell *vs.* Moores, 88 N. W., 242. In the latter case the previous holding of the Supreme Court of Nebraska, in State *vs.* Moores, 55 Neb., 480, was overruled.

The judgment of the District Court is reversed and the cause remanded with directions to enter judgment for the defendants.

Reversed and Remanded.

42 Thereupon the said appellees Wolfe Londoner and Dennis Sheedy filed in the Supreme Court of the State of Colorado their petition for a re-hearing in said cause, which was and is in words and figures as follows, to wit:

In the Supreme Court of the State of Colorado.

No. 4488.

THE CITY OF DENVER ET AL., Appellants,
vs.
WOLFE LONDONER ET AL., Appellees.

Now come the appellees and respectfully petition the Court for a rehearing and oral argument of the above cause at a time to be fixed by the Court, and for cause thereof show;

I. The Court erred in holding that the action of a municipality in constructing Viaducts, paving and other similar public improvements was an exercise of the police power.

II. The Court erred in holding that the 1893 Charter provides for "due process of law," and in so doing, in fact, though not in words, overrules the express holding of this Court in the case of Brown *v.* City of Denver, 7 Colo. 305, (311-312), decided in 1884, which has never before been qualified or doubted, but repeatedly followed, in the three most essential requisites of due process of law as defined by the Court in that case, viz,—

(*a.*) The court erred in its construction, and misconceived the idea intended to be conveyed by the word 'competent,' as used in that case. Though we agree with the court in defining it to mean proper and suitable or legally qualified to act, yet we respectfully submit it does not follow that the city council is 'legally qualified to act.' The term as applied to a judicial or quasi-judicial proceeding means the power to determine the matters brought before the tribunal, and to enforce the rights of the parties as determined. The cases cited by the Court in Brown *v.* Denver all define the term 'competent to administer relief' as necessarily including the power to render and enforce a decision which will affect the status of the parties to a proceeding. As we will more fully show by the brief filed in support of this petition our contention is not only that the decision of the council is not final, but that it is no decision whatever and its finding in no way affects, or can be made to affect, the rights of the parties to the proceeding, because there is no power to enforce its decision or carry out its findings, and therefore the whole proceeding is a nul-ity.

(*b.*) While the Brown case expressly holds that the law shall expressly provide for a hearing at a specified time and place, with which ruling this opinion does not seem to agree, yet it is not necessary to go into that question, as in this particular case the proceedure was insufficient and unconstitutional in violation of due process of law for the reason that the record clearly and affirmatively shows that no such notice was afforded the parties in this district, although the charter may be broad enough in its terms to have permitted of and sanctioned it; and the record further affirmatively discloses that the plaintiffs, or their grantors, did file written complaints and objections in strict compliance with the charter provisions, and asked, but were refused, permission to be heard thereon.

(*c*) Another reason why the proceedure was unconstitutional is that the law having finally and absolutely determined and prescribed the mode and method by which assessments should be levied and the exact amount to be levied upon each tract of land (to be arrived at by mathematical calculation merely) with-held from the council and all other municipal authorities the right, power or authority to change the method and rule prescribed, no matter what the equities of the case might be, any hearings upon objections to the apportionment, even if granted, would be without hope of relief and farsical.

43 III. The court erred in holding that the finding of the city council in the creating ordinance, without any opportunities for hearing before them, concluded the property owner upon the question of whether or not notice was or was not duly given and that a valid petition had or had not been filed, thereby violating the due process or law clause of the State constitution and of the 14th Amendment to the Federal Constitution.

IV. That the court erred in its opinion in the application of the law to the facts of the case in assuming that two procedures are provided for in the public improvement article of the character, the second curative of the first, whereas, in fact, the charter provided for but one procedure in which each successive step is dependent upon a compliance with the several requirements of the charter and each of which is, and is conceded in the opinion to be, jurisdictional, so that a failure to comply with the first or preliminary steps left the city without power and rendered void all subsequent steps including the ordinance creating the district, the letting of the contract, the assessment, etc., there being no provision in the charter for curative legislation applicable,—and all in violation of due process of law.

V. The court erred in assuming that the plaintiffs objected to the assessment simply because the assessment against the various strips of land was excessive, whereas the plaintiffs' real contention at all times has been that their property was *confiscated*, and such was the ruling of the trial court.

VI. The court erred in holding that the plaintiffs were precluded from applying to the courts for relief from an assessment which confiscated their property because of their failure to make a tender of the 'proper amount' in an action where no portion of the alleged claim was liquidated and they alleged and claimed that the entire assessment was illegal and void and a tender of any amount would have been a confession of the falsity of their contention.

VII. The court erred in applying the principles applicable to general taxation for the support of the government to special assessments for local improvements, in which the sole basis for the exaction is special benefits at least equal to the amount of the assessment, conferred by the improvement.

VIII. That upon the oral hearing which was had May 2nd, 1904, over six months prior to the handing down of this opinion, six important improvement cases involving different facts and circumstances, to each of which different rules of law were applicable, and in which cases there were some six different individuals or firms represented as attorneys, were all heard at the same time, the time of argument being very limited, thereby making it impossible in the time allowed fo more than a very cursory presentation of the facts and law applicable to any of the cases.

(Signed) JOSHUA GROZIER,
Attorney for Appellees.

We, the undersigned, members of the bar of this Court, being personally or having clients interested in the questions at issue herein, and believing that there is merit in the contentions made, do hereby

respectfully urge that the foregoing petition for a re-hearing be granted, at least to the extent of an oral hearing and filing of briefs.

(Signed) JULIUS B. BISSELL.
" BARTELLS, BLOOD & BANCROFT.
" TALBOT, DEENISON & WADLEY.
" ROGERS, CUTHBERT & ELLIS.
" ROBERT COLLIER.
" W. C. KINGSLEY.
" A. M. STEVENSON.
" M. B. CARPENTER.
" WILLIAM L. DAYTON.
" A. C. PHELPS.
" HIRAM D. INGERSOLL.

That thereafter, and on March 20th, 1905, said Supreme Court of Colorado, handed down and filed in said Court its opinion in writing denying the said application for a re-hearing, which said opinion was and is in words and figures as follows,—

44 No. 4488.

On Petition for Rehearing.

Per Curiam:

Our conclusion, announced in City *v.* Dumars, ante ——, that the absence of a provision in the charter for notice to those who may file objections and protests against the assessment of the time and place where such objections would be heard and determined, does not render the charter unconstitutional, because the city authorities would have the power to make provision for such notice, is fully sustained by the case of Paulsen *v.* Portland, 149 U. S., 30. The opinion in that case, in discussing this question, holds, in substance, that the city is a miniature state, its council the legislature, and the charter its constitution, and it is enough if by the charter power is granted the municipal authorities to provide for notice to the tax payers before a special assessment becomes final. See

Gilmore *v.* Hentig, 33 Kan., 156;
Gath *v.* City of Des Moines, 63 Iowa, 718.

It is now claimed the record discloses that no notice was, in fact, given to the tax payers filing protests and objections, and that no provision is made by ordinance or otherwise for such notice. We do not think the record supports this contention. The reference to the abstract—folio 442—does not refer to the subject of notice, but to the particular action taken by the municipal authorities in disposing of the protests and objections filed. It may be questionable if plaintiffs filed any protests or objections which the law
45 contemplates shall be heard and determined by the city council sitting as a board of equalization. If they did not, then the matter of notice to them of a hearing on such as they did file, would be immaterial.

It is urged we erred in holding that the findings of the city council without notice or opportunity for the tax payers to be heard on the sufficiency of the petition was conclusive upon the property owners. Findings on questions of fact touching matters inherently jurisdictional would probably not be conclusive without notice and opportunity to be heard, but *ex parte* findings with respect to steps which the charter prescribes, and which are not required because of any constitutional provision, are final when the charter so provides. Were it not for the provision in the charter authorizing the municipal authorities to find *ex parte* on the sufficiency of the petition, no doubt such finding in the absence of notice to the tax payers, and opportunity to be heard, could be attacked collaterally, but as the finding relates to a matter which is not inherently jurisdictional, and as the charter authorizes it to be made in the manner it was, the facts upon which it is based cannot be questioned. The authorities cited by counsel do not hold to the contrary. Mulligan *v.* Smith, 59 Cal., 206, Zeigler *v.* Hopkins, 117 U. S., 683, and Miller *v.* City of Amsterdam, 149 N. Y., 288, are cases holding that findings of fact by the municipal authorities without notice to the tax payer were not binding upon the latter, but it will be observed that in each of these cases the city authorities were not authorized to determine the questions *ex parte*.

Petition for Rehearing Denied.

46 And the said Supreme Court then and there on said March 20th., 1905 ordered that final judgment be and the same hereby is entered in said cause in said court in favor of the said Appellants and against the said appellees. Wolfe Londoner and Dennis Sheedy, and that the said appellants do have and recover their costs herein to be taxed, and that they have execution therefor.

To each of which said orders of court and to the judgment the said appellees Wolfe Londoner and Dennis Sheedy then and there separately severally duly excepted. Order Supreme Court substituting City and County of Denver, successor, and W. J. Fine, Treasurer thereof, successor etc., as appellees.

STATE OF COLORADO, *City and County of Denver, ss:*

I, Horace G. Clark, Clerk of the Supreme Court of the State of Colorado, do hereby certify that the foregoing is a true copy of the complaint, demurrer to complaint, answer, replication, orders of District Court, Decree of District Court, Bill of Exceptions, opinion of Supreme Court, Petition for re-hearing, Judgment of Supreme Court, exceptions and orders entered in the Supreme Court of Colorado, in the case entitled The City of Denver, *et al.*, Appellants, *vs.* Wolfe Londoner, *et al.*, Appellees, (No. 4488) as the same were filed and are now of record in my office indicated by the præcipe of attorney for appellees.

Witness my hand and the seal of the said Supreme Court of Colorado affixed at my office in the City and County of Denver this 3rd., day of November, A. D., 1906.

[Seal of Supreme Court of Colorado.]

(Signed) HORACE G. CLARK, *Clerk,*
By JAMES PERCHARD, *Deputy.*

47 That thereafter, and on November 3rd., 1906., the said appellees Wolfe Londoner and Dennis Sheedy duly filed in the Supreme Court of the State of Colorado, their petition for a writ of error, accompanied by written assignment of errors, assigned by them, and their prayer for a reversal. Which said petition for writ of error, (omitting caption) was in the following words,—

Considering themselves aggrieved by the final decision of the Supreme Court in rendering judgment against them in the above entitled cause, the said Wolfe Londoner and Dennis Sheedy plaintiffs in error who were appellees in the Supreme Court of Colorado hereby pray a writ of error from the said decision and judgment to the Supreme Court of the United States. Assignment of Errors herewith.

(Signed) JOSHUA GROZIER,
Attorney for said Wolfe Londoner and Dennis Sheedy.

That on said November 3rd., 1906, the Honorable Robert W. Steele, acting Chief Justice of the Supreme Court of the State of Colorado, endorsed upon the said petition for a writ of error the following,—

STATE OF COLORADO, *Supreme Court, ss:*

Let the writ of error issue upon the execution of a bond by Wolfe Londoner and Dennis Sheedy to the City and County of Denver and W. J. Fine, as Treasurer of the City and County of Denver, Colorado, in the aggregate penal sum of three hundred dollars

(Signed) ROBERT W. STEELE,
Acting Chief Justice of the Supreme Court of Colorado.

That the above mentioned assignment of errors and prayer for a reversal was and is (omitting caption) in words and figures as follows, to wit,—

Now come Wolfe Londoner and Dennis Sheedy, appellees so called in said cause as it appears in the Supreme Court of Colorado, and say that there are errors in the record and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, make the following assignments,—

First. The Supreme Court of Colorado erred in holding and deciding that the portion of proviso "Eighth" of Section 3 of
48 Article 7 of "An act to Revise and Amend *and* Charter of the City of Denver, Colorado, signed and approved by the Gov-

ernor of Colorado April 3rd, 1893" (commonly called the Denver City Charter of 1893) which provided, "And the finding of the City Council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal," as construed by the Supreme Court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted was drawn in question and denied by appellees in said cause on the ground of it being repugnant to the due process of law clause of the 14th., Amendment of the Constitution of the United States, and in contravention thereof.

Second. The Supreme Court of Colorado further erred in assuming that said City Council ever made a finding by ordinance in accordance with said proviso "Eighth."

Third. The Supreme Court of Colorado erred in reversing the District Court of the Second Judicial District of Colorado in said cause and in directing the entry and in entering a judgment against the appellees in said cause. All this without permitting the said cause to be re-tried before said District Court, notwithstanding counsel for said appellees in the petition for rehearing in said cause called attention to the fact that the Abstract of the Record and the Record proper at folio 442, *et seq.*, and elsewhere therein affirmatively disclosed that the plaintiffs or their grantors did file written complaints and objections in strict accordance with the City Clerk's advertisement under section 30 of said article 7 of said City Charter, and after declining and refusing to hear the plaintiffs or any of them in person or by attorney and declining and refusing to take testimony as to the question of benefits, without any hearings summarily overruled said protests and written objections, and refused thereafter to grant any hearing whatever and summarily enacted the assessment ordinance without hearing or opportunity for hearing. The above appears from Deputy City Clerk Weber's testimony, uncontradicted. After producing the protests, Exhibits "D" and "E" filed by the property owners in strict accordance with and within the time stated in said section 30, and showing from the official records of the city Clerk that those written protests and objections had been unceremoniously overruled by the city council sitting as a board of equalization, the following questions were asked the witness by counsel for the plaintiffs. (Record folio 442)

Q. That was acting on those protests?

A. Yes sir.

Q. And the only action had on those protests which have been introduced in evidence?

A. The only action had; yes sir.

Q. And that was the only action had on that day on the 8th., Avenue Pavement?

A. Yes sir.

Q. Or since?

A. Yes sir.

And all that notwithstanding counsel for appellees called the attention of the court to the above testimony and further called the attention of the court in the petition for a rehearing that the fact was that no other hearing or opportunity for hearing was given and upon a new trial they could conclusively show that no hearing or opportunity for hearing was given.

Fifth. The Supreme Court of Colorado more particularly erred in holding and deciding that the city authorities in following the procedure in this 8th., Avenue Paving District No. 1 of the City of Denver, Colorado, in the manner in which the record, evidence and decree of the trial Court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the 14th., Amendment of the Constitution of the United States.

Ninth. The Supreme Court of Colorado erred in upholding sections 29, 30, and 31, and each thereof, of article 7 of "An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado April 3rd., 1893" (commonly called the Denver City Charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty and property of these several plaintiffs in error without due process of law in violation of both the State and Federal Constitution, and the 14th., Amendment thereof.

49 Tenth. The Supreme Court of Colorado erred in upholding each of the several assessments against the corner lots, and particularly those lots belonging to said Wolfe Londoner and Dennis Sheedy, because each thereof was assessed for the paving and other improvements in this district alone for more than the several lots so assessed were ever actually worth and far in excess of any special benefits received from the alleged improvements.

For which errors, said appellees so styled in the Supreme Court of Colorado, who will style themselves Plaintiffs in Error in the Supreme Court of the United States, pray that the judgment and decree of the Supreme Court of Colorado so far as concerns them or their said property, in said cause, be reversed, set aside and for nought held, and the decree of the district court of the Second Judicial District of Colorado in said cause in her favor be affirmed, and that they have judgment for their costs herein to be taxed.

(Signed) JOSHUA GROZIER,
Attorney for said Wolfe Londoner and Dennis Sheedy.

On November 3, 1906 a bond was duly executed and signed by the said Wolfe Londoner and Dennis Sheedy, with Joshua Grozier as surety, and duly filed in said Supreme Court of Colorado, and duly approved by Robert W. Steele, acting Chief Justice of the Supreme Court of the State of Colorado, in the penal sum of $300.00. Said bond was filed in said Supreme Court of Colorado on November 3, 1906, and omitting caption and justification, was in words as follows,—

Know all men by these presents, that we, Wolfe Londoner and Dennis Sheedy, as principals, and Joshua Grozier as surety, are held and firmly bound unto the City and County of Denver Colorado, and W. J. Fine as Treasurer of the City and County of Denver, Colorado, in the penal sum of $300.00, to be paid to the said City and County of Denver, Colorado, and W. J. Fine as Treasurer thereof, we bind ourselves jointly and severally by these presents. Sealed with our seals and dated this 3rd., day of November, 1905.

Whereas the above named Wolfe Londoner and Dennis Sheedy seek to prosecute their writ of error to the Supreme Court of the United States to reverse the judgment and decree rendered in the above entitled cause by the Supreme Court of the State of Colorado against them.

Now therefore the condition of this obligation is such that if the above named plaintiffs in error shall prosecute this writ of error with effect, and answer all costs and damages that may be adjudged if it shall fail to make its plea, then this obligation to be void, otherwise to remain in full force and effect.

(Signed) WOLFE LONDONER. [SEAL.]
(Signed) DENNIS SHEEDY. [SEAL.]
(Signed) JOSHUA GROZIER. [SEAL.]

(Endorsed on the foregoing:) The above bond is approved. (Signed) Robert W. Steele, Acting Chief Justice of the Supreme Court of the State of Colorado.

And thereupon the following writ of error was duly issued:

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Supreme Court of the State of Colorado:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the Supreme Court of the State of Colorado, before you, at the September term 1905 thereof, between Wolfe Londoner and Dennis Sheedy (appellees in said Supreme Court of Colorado) Plaintiffs in Error, and The City of Denver (City and County of Denver substituted as successor to The City of Denver) and Charles S. Elder as County Treasurer of Arapahoe County, Colorado and *ex-officio* Collector of The City of Denver, (W. J. Fine as Treasurer of the City and County of Denver, Colorado, substituted as successor to Charles S. Elder as County Treasurer of Arapahoe County Colorado and *ex-officio* Collector of The City of Denver), (appellants in said Supreme Court of Colorado), Defendants
50 in Error, a manifest error has happened, to the great damage of the said Wolfe Londoner and Dennis Sheedy, as by their complaint appears.

We being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and

proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the said record and proceedings aforesaid, at the City of Washington, D. C., and filed in the office of the Clerk of the United States Supreme Court on or before thirty days from the date hereof, to the end that the record and proceedings aforesaid being inspected, the United States Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this November 3rd., 1906.

Done at the City and County of Denver, Colorado, with the seal of the Circuit Court of the United States for the District of Colorado attached.

[SEAL.] (Signed) CHARLES W. BISHOP,
Clerk Circuit Court United States,
District of Colorado.

Allowed.

(Signed) ROBERT W. STEELE,
Acting Chief Justice of the Supreme
Court of the State of Colorado.

And thereupon the following citation was duly issued:—

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the City and County of Denver (substituted as successor to The City of Denver), and W. J. Fine as Treasurer of the City and County of Denver (substituted as successor to Charles S. Elder as County Treasurer of Arapahoe County, Colorado, and *ex-officio* Collector of The City of Denver, Colorado), Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Colorado, wherein Wolfe Londoner and Dennis Sheedy are Plaintiffs in Error, and The City of Denver (City and County of Denver substituted as successor to The City of Denver) and Charles S. Elder as County Treasurer of Arapahoe County, Colorado and *ex-officio* Collector of The City of Denver, (W. J. Fine as Treasurer of the City and County of Denver, Colorado, substituted as successor to Charles S. Elder as County Treasurer of Arapahoe County, Colorado and *ex-officio* Collector of The City of Denver), are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiffs in error as in said writ mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Colorado, this 3rd. day of November, A. D., 1906.

(Signed) ROBERT W. STEELE,
Acting Chief Justice of the Supreme Court of the State of Colorado.

Attest:

[Seal of Colorado Supreme Court.]

(Signed) HORACE G. CLARK,
Clerk of the Supreme Court of the State of Colorado.

Attached to said citation and endorsed thereon is the following:

UNITED STATES OF AMERICA, *District of Colorado, ss:*

I do hereby certify that I have duly served the within named City and County of Denver and W. J. Fine as Treasurer of the City and County of Denver with a true copy of the foregoing citation with a copy of the writ of error attached, all on this 3rd., day of November, 1906.

(Signed) DEWEY C. BAILEY,
Marshall U. S., Dist. of Colorado.

51 DENVER, COLORADO, *November* 3, 1906.

I, attorney of record for the defendants in error in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

(Signed) H. A. LINDSLEY,
Attorney for Defendants in Error.

"The original and foregoing bond and writ of error was lodged with the clerk of the Supreme Court of the State of Colorado on November 3rd., 1906, and also at the same time and place, a copy thereof for each of the defendants in error. One of the said copies being addressed personally to each of the said defendants in error respectively. The following indorsement was made upon the said original writ and upon each copy: Writ of Error. Filed, November 3, 1906. Horace G. Clark, Clerk Supreme Court of Colorado."

Return to writ by *Clark* Supreme Court of Colorado, as follows:

UNITED STATES OF AMERICA, *Supreme Court of Colorado, ss:*

In obedience to the commands of the within writ, I herewith transmit — the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of the Supreme Court of the State of Colorado, at the City and County of Denver, Colorado, this 3rd., day of November, A. D., 1906.

[Seal Colorado Supreme Court.]

(Signed) HORACE G. CLARK,
Clerk Supreme Court of the State of Colorado.

SUPREME COURT, COLORADO,
DENVER, *November* 3, 1906.

James H. McKenney, Esq., Clerk U. S. Supreme Court, Washington, D. C.

DEAR SIR: I have the honor to send, express paid, transcript of record to be filed in your office, pursuant to writ of error to the Supreme Court of the State of Colorado in Wolfe Londoner and Dennis Sheedy, Plaintiffs in Error *vs.* City and County of Denver, *et al.*, Defendants in Error.

The attorneys of record in the case are as follows: Joshua Grozier, for plaintiffs in error; residence Denver, Colo.; H. A. Lindsley and H. L. Ritter, attorneys for defendants in error; residence Denver, Colo.

Very respectfully,

HORACE G. CLARK,
Clerk Supreme Court of Colorado.

Cost original transcript $100 paid by att'y for pl'tf's in Error.

52 In the Supreme Court of the United States of America.

No. 157, October Term, 1907.

WOLFE LONDONER and DENNIS SHEEDY, Plaintiffs in Error,
vs.
CITY AND COUNTY OF DENVER and W. J. FINE, as Treasurer of the City and County of Denver, Colorado, Defendants in Error.

It is hereby stipulated and agreed by and between the attorneys for the respective parties in the above entitled cause that the above and foregoing is an accurate and correct transcript of the original record on file herein in said cause, eliminating merely formal matters therein and putting the same in regular, proper and convenient order, and may be considered as having been duly filed in this Court as of the date of the filing of the original record herein; and the same is hereby stipulated as the record in said cause and that this cause may be tried in this court on said agreed record instead of on the record on file.

JOSHUA FREEMAN GROZIER,
Attorney for Plaintiffs in Error.
HALSTED L. RITTER,
Attorney for Defendants in Error.

53 [Endorsed:] No. 157, Oct. Term, 1907. In United States Supreme Court. Wolfe Londoner and Dennis Sheedy, Plaintiffs in Error, *vs.* City and County of Denver, *et al.*, Defendants in Error. Stipulated record and stipulation. Joshua Freeman Grozier, For Pl'ff's in Error. Halsted L. Ritter, For Def'ts in Error.

[Endorsed:] File No. 20,462. Supreme Court U. S., October Term, 1907. Term No. 157. Wolfe Londoner *et al.*, pl'ffs in error, *vs.* The City and County of Denver *et al.* Agreed record. Filed Sept. 3, 1907.

Supreme Court, U. S.
FILED
JAN 29 1908
JAMES H. McKENNEY
Clerk.

No. 157.

SUPREME COURT OF THE UNITED STATES.

OCTOBER 1907 TERM.

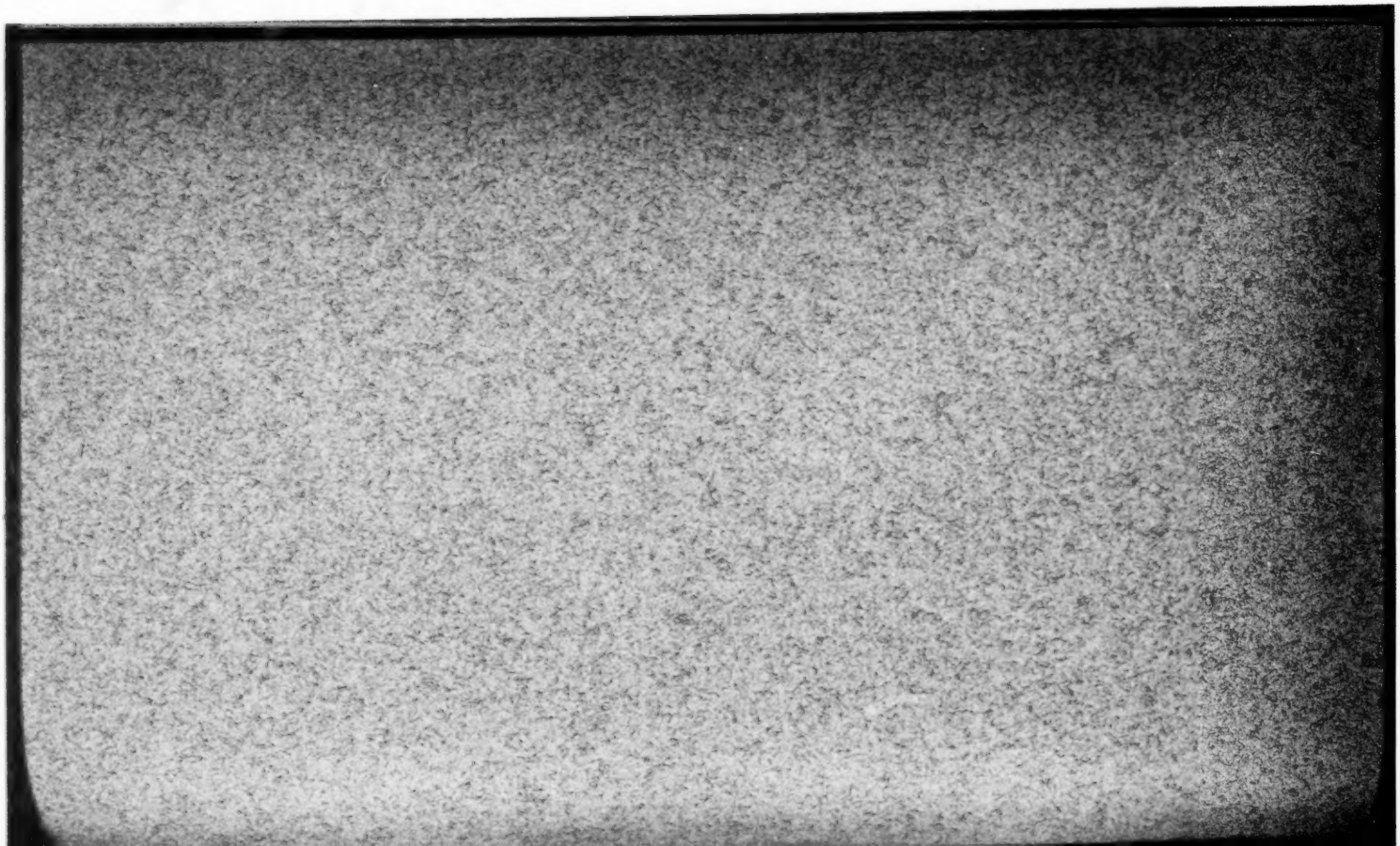
WOLFE LONDONER AND DENNIS SHEEDY,
PLAINTIFFS IN ERROR,

vs.

CITY AND COUNTY OF DENVER, COLORADO, AND W. J. FINE AS TREASURER OF SAID CITY AND COUNTY OF DENVER, COLORADO, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

JOSHUA FREEMAN GROZIER,
Attorney for Plaintiffs in Error.



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No. 157.

SUPREME COURT OF THE UNITED STATES.

OCTOBER 1907 TERM.

WOLFE LONDONER AND DENNIS SHEEDY, PLAINTIFFS IN ERROR,

vs.

CITY AND COUNTY OF DENVER, COLORADO, AND W. J. FINE AS TREASURER OF SAID CITY AND COUNTY OF DENVER, COLORADO, DEFENDANTS IN ERROR.

BRIEF AND ARGUMENT OF PLAINTIFFS IN ERROR.

Statement of the Case.

This is a suit begun April 2nd, 1900, by plaintiffs in error, as plaintiffs, against the City of Denver (City and County of Denver later substituted as successor), and Charles S. Elder as County Treasurer of Arapahoe County, Colorado, and ex-officio Collector of the City of Denver (W. J. Fine as Treasurer of the City and County of Denver later substituted as successor), as defendants, in the District Court of the Second Judicial District of Colorado, for the purpose of having vacated and held for naught

alleged special assessments against the lots and fractional lots of the several plaintiffs in the so-called 8th Avenue Paving District No. 1 (pp. 1 to 26). Defendants answered (p. 26) and plaintiffs replied (p. 27).

As "the plaintiffs introduced testimony *supporting* their several allegations" (p. 27) and in its findings (p. 48) and decree (p. 49) the trial court specifically found *each* of the allegations of the complaint true, I assume it only necessary to summarize the more important allegations of the complaint, sometimes for a clearer understanding, applying the evidence thereto, in order to enable the court to arrive at a correct statement of conceded facts to which to apply the law applicable. The Supreme Court, in its opinion, disturbs none of the fact findings of the trial court. It treats the complaint as insufficient to permit the introduction of any evidence, because solely of the *conclusive* provision of proviso "eight" of § 3, Article 7, in the Charter.

The provisions of the City Charter deemed material to this discussion are printed at the end of this brief. My folio references are *inclusive* and to the *pages* of the printed Agreed Record.

The complaint alleges the official status of defendants as State agencies and that plaintiffs are each owners of property in the so-called paving district claimed to be assessed. That on May 24th, 1907, a petition for paving was filed with the Works Board. The body of this petition is set out *in haec verba* and for brevity will hereafter be referred to as the "Bermudez" petition. It called for paving said avenue with a 2-inch *wearing surface* of one of three designated asphalts (of which *Bermudez* was one),

on a 4-inch *concrete foundation*, at a total *cost* not to exceed $2.35 per square yard. That said or any petition was never signed by any plaintiff or prior owner of any of his property and was was not subscribed by the owners of a majority of the frontage to be assessed; alleges (and shown from the testimony of Hughes, p. 27, the Slaydens, Fenner and Carpenter, pp. 28 and 29) that *prior* to the filing of said petition with said Works Board written withdrawals from said petition duly subscribed and filed with said Board by property owners owning at least 3,834 feet front originally on said petition while it was being circulated, including among others Emma C. Slayden with 1,633, Carpenter with 225, Campion with 733, Mrs. Grant with 735, Mrs. Hawkins with 233, Bohm with 25, and Glaspell with 250 feet frontage in the district, being more than sufficient to reduce the petition as filed to a minority petition were it ever (which it is specifically alleged it was not), other than a mere minority petition.

That a majority of the frontage in the so-called district was 8,497.55 feet, and with these specified names withdrawn said petition was subscribed by the owners of not more than 5,565.2 front feet or 2,932.35 feet less than a majority of the frontage in the district.

That the Works Board ignored these withdrawals and prepared a form of a bill for an ordinance under that Bermudez petition and recommended to the City Council they enact the same into a *creating* ordinance. Attorney Carpenter by chance hearing of this, on behalf of himself and these other property owners who had filed written withdrawals, obtained permission to appear before the Board of Public Works, the

City Council and its Committee on Streets, Alleys and Bridges (which happened to have two friendly brother lawyers upon it), made an argument on the insufficiency of this Bermudez petition and the validity of the withdrawals, and succeeded in getting said committee to report against the petition and proposed ordinance, the City Council to recognize said withdrawals as valid, and to vote down and kill said petition and proposed ordinance. (Complaint, 1 and 2; testimony, 27 to 29).

I may as well state in this connection, in order to leave only the federal questions for discussion in the argument proper, that the authorities are unanimous that signers of a petition such as involved in the case at bar, may withdraw at any time *before* the city accepts and acts upon the petition. In other words, the petition, until accepted by the city, stands in the same light legally as a contemplated proposition by property owners to the city to permit it to pave and assess on certain conditions, and until said unmade propostion is made, accepted and formally acted upon, the property owners may withdraw their contemplated consent. This proposition of law, adopted by the trial court in its findings and decree and *not questioned* by the State Supreme Court in its opinion, is supported by the following very applicable authorities and, as I understand, is unquestioned and unquestionable:

Elliott, Roads and Streets (2nd Ed.) § 332.

Winnebago Co. v. City, 113 Wis. 72, op. 75.

Le Lone v. Board, 80 Wis. 380, op. 383.

City v. Armstrong, 12 Utah, 476, affirmed 168 U. S. 224, op. 235.

After being once turned down in the Council, the Bermudez petition was *functus officio*, dead, and, to quote from the decisions, "*had no further validity to endow the city with authority to act*," for any purpose. In such case, "in order to possess authority to proceed, a *new* petition, properly signed anew by the owners of the required frontage must be obtained," and the entire statutory procedure begun and fully complied with.

Vennum v. Village, 202 Ill. 423, op. 424.
Bass v. City, 195 Ill. 109, op. 110.
Merritt v. City, 175 Ill. 537, op. 552.
Graves v. Otis, 2 Hill (N. Y.) 466.
Angus v. City, 74 Conn. 27, op. 34.
City v. O'Reilly, 169 Pa. St. 366, op. 372-375.
Kelso v. Cole, 121 Cal. 121, op. 124.
Cont. Co. v. McGovern, 127 Cal. 638.
Pavi. Co. v. Sullivan, 137 Cal. 261.
City v. Scott, 104 Mo. App. 595.

Even a withdrawal of the withdrawals could not resurrect the petition.

13 Ency. P. & P., p. 305, § 4.
Knapfi v. Co., 92 Mo. App. 279.
Roebling v. City, 58 N. J. Law, 40.

Several months after the killing of the "Bermudez" petition, an entirely *different* one, known as the "Alcatraz" petition, was filed, calling for paving said avenue with a 2-inch *wearing surface* of one of three designated asphalts (*none* of which were

Bermudez but one of which was *Alcatraz)* on a 6-inch *base* with a ¾-inch *binder* at a total *cost* not to exceed $1.98 per square yard. (2 and 3.)

This petition *before* it was filed and *before* withdrawals therefrom *purported* to be, but was not, in fact, signed by the owners of 8,742.32 feet of frontage (all of which signatures, except those of the owners of 148.82 feet of frontage, had also been signed to the Bermudez petition *before* withdrawals from that petition).

The complaint alleges this Alcatraz petition was *never* subscribed by the owners of a majority of the frontage to be assessed (3), and the undisputed testimony of Works Board Secretary Hughes (27 and 29), James H. Brown (29 to 34), Richard Huson Hart (33), and Works Board members Wood and Seerie (34), conclusively establishes that *at least* Hart, Slayden, Campion, Chamberlain, Bohm and Hawkins, owning an aggregate of 2,845 feet of frontage in the district, as well as others whose names and frontages do not appear, had originally been induced to sign it on the representation that it amounted to a withdrawal from the Bermudez petition, but on learning the truth endeavored to find this Alcatraz petition, or its circulator, so as to erase their names from it, but being unable to find either the petition or its circulator, they subscribed and caused to be filed with the Works Board *prior to the filing of the petition itself* a written withdrawal of their properties and signatures, thereby reducing the petition as filed to, at the very outside, a petition signed by the owners of not more than 5,897.32 feet of frontage in the district, the owners of all but 148.82 front feet of which had once been on the

Bermudez petition. (Complaint, 2 to 4, also bottom 13; testimony, 29 to 35.)

Brown and Hart also testified in support of the allegations of the complaint that as the Works Board at first refused to recognize the written withdrawals filed, Mr. Hart began a mandamus suit against and secured and served a peremptory writ of mandamus on the Works Board to compel them to recognize said withdrawals. The mandamus complaint, writ and acceptance of service of same on January 15th, 1898 *(three days prior to the filing of the Alcatraz petition)*, were introduced in evidence and are in the printed record as a part of Brown's testimony.

The complaint alleges, the answer admits, it was clearly proven and the trial court found (48 and 49) that these two petitions were the only petitions ever filed, and that these petitions, taken separately or together, were *not* subscribed by the owners of a majority of the frontage to be assessed. Even adding the names and frontage on both petitions together as one petition,—(for which there is absolutely no authority in law, morals or common sense if for no other reason they were rival *antagonistic* petitions for *different* materials, at *different* prices, to be laid in entirely *different* manners),—*in the aggregate* they were signed by the owners of not to exceed 6,046.14 feet of frontage, or at least 2,451.41 feet *less* than a majority of the frontage to be assessed in the so-called district. And this without considering forgeries, improper signatures, etc.

The Works Board, however, as the complaint shows, some sixteen months after the filing with them of the minority "Alcatraz" petition, on April 6th, 1899, *without obtaining any additional or new*

petition, went ahead and published a so-called advertisement, to which, it is alleged in the complaint and found by the trial court, a written remonstrance against the improvements subscribed by the owners of more than a majority of the frontage to be assessed was duly filed. (4 to 6.)

That the filing of this majority remonstrance was fatal to the jurisdiction of the city, even had jurisdiction ever existed, to proceed with the improvement, see:

Charter Art. 7, § 3, proviso 4.

Rhodes v. Board, 10 Colo. App. 100.

City v. Babcock, 123 Cal. 205.

Ogden v. Armstrong, 12 Utah, 476; s. c. 168 U. S. 224.

Also some of cases *supra*.

Several additional jurisdictional defects amounting, under the decisions of the State court, *alone of themselves*, in a failure to acquire and retain jurisdiction, including (a) failure to comply with proviso "First" of said § 3, Article 7 of the Charter (p. 9); (b) failure to construct the alleged improvements at the established grade (p. 9 and 14); (c) changes of plans in violation of proviso "Fifth" of said § 3 and changes of the official grades *after* the ordering of the alleged improvements by an ordinance contemplating the then previously established grade (p. 14);

City v. Campbell, 33 Colo. 162, op. 165.

Rhodes v. Board, 10 Colo. App. 99.

Dumars v. Denver, 16 Colo. App. 375, op. 392.

City v. Armstrong, 12 Utah, 476; s. c. 168 U. S. 224.
Whaples v. City, 179 Ill. 310.
Whittaker v. City, 12 S. D. 608.
City v. Daggett, 53 Kas. 491.
Warren v. Chandos, 115 Cal. 382.
Co. v. Allman, 136 Cal. 88.
Shaffner v. City, 31 Mo., op. 273.
McAllister v. City, 9 Wash. 272.

(d) failure of the council to investigate or give any notice or permit any right and opportunity for hearings before the council prior to the recital of a wholly insufficient so-called "finding" in the alleged creating ordinance (13); and (e) purely ex parte unauthorized *recitals of alleged findings* without investigation and opportunity for hearing interested property owners, instead of the "finding" authorized by said proviso "Eighth." The technical term "*finding*" I claim contemplates the necessity for investigation and hearing.

That compliance with *all*, not merely a *part*, of the preliminary procedure, is jurisdictional to the power of the city to legally order paving on the assessment plan, see the above cited cases and also the five later Colorado decisions of,—

City v. Dunning, 33 Colo. 487.
Mitchell v. Titus, 33 Colo. op. 387.
Ahern v. Board (Colo.), 89 Pac. 963.
Lambert v. Sherway, 36 Colo. 352.
People v. Bircher, decided Dec. 3, 1907, not yet reported.

Also Brown v. City, 7 Colo. 305.
Keeze v. City, 10 Colo. 112.

In explanation of the Campbell case, *supra*, on the points to which it is cited above, I desired to say that case, together with the case at bar and Kennedy, Dumars, Hallett, Spalding cases, were all argued together on the same day. The record in the Campbell case showed the identical so-called "finding" in the creating ordinance as that in the case at bar. The decisions in all of these cases *with the sole exception of the Campbell case*, were handed down at the same time. The fact that the Campbell case was not decided by the court *on the same ground* as the Dumars and Londoner cases, indicates that the court did not consider charter proviso "Eighth" applicable. The only possible reason it was not applicable to that if to this and the Dumars case must be because of the gross alterations of the plans *after* the passage of the creating ordinance.

In June, 1899, the City Council pretended to enact so-called *creating* ordinance No. 57 of 1899, set out in the complaint (10 to 13). The validity and power to enact this ordinance was made an issue. It is this so-called ordinance which, without giving any notice or affording any of the property owners any right or opportunity to be heard, (complaint 13, Weber's testimony, bottom pp. 39 and 40), contained the ex parte legislative recital or so-called "finding," the existence of which furnishes the *sole* basis for the reversal in the State Supreme Court of the judgment and decree of the trial court in this case.

This so-called creating ordinance bears no in-

dorsement of the Works Board (required by charter § 2) and it was not *the* bill for an ordinance the Works Board recommended and identified by the signature of the president (top p. 9). Its recitals materially differ from those in the resolution. It first *inaccurately* recites a resolution of the Works Board of date May 8th, 1899, which stated in substance that on December 10th, 1897, said board had adopted full details and specifications for the paving under the first or "Bermudez" petition, which specifications, etc., on March 18th, 1898, after the filing of the "Alcatraz" petition said Works Board so changed as to include the four different asphalts referred to in the two antagonistic petitions,—(Trinidad and Pacific asphalts in both petitions, Bermudez in *only* one and Alcatraz in *only* the other). The ordinance recital substantially differs from the language of the resolution in fact adopted by the Works Board (pages 8 and 9), which latter read:

> "Whereas, prior to the passage of said resolution certain petitionS were first presented to this board, subscribed by the owners of a majority of the frontage to be assessed for said improvements," (bottom p. 8)

whereas in the ordinance recital adopted are the additional words "*for said improvements*" after the word "petitionS" and the additional phrase "*as by the city charter required*," at the end of the recital as made in the real Works Board resolution. The so-called ordinance (middle p. 11) at § 2 thereof makes the so-called "*finding*":

> "That upon consideration of the prem-

> ises the city council doth find that in their action and proceedings in relation to said 8th Avenue Paving District No. 1 the *said board of public works* has fully *complied* with the requirements of the city charter relating thereto." (p. 12.)

It is this fraudulent ex parte *mis-recital of an alleged finding* by claimed ordinance, without any *investigation, notice or opportunity for hearings*, or finding concerning any petition by property owners, which furnishes the sole basis of the opinion and reversal by the State Supreme Court of the trial court.

It is of course immaterial by whom or how it happened the *ordinance* differed from the Works Board resolution. As it was not the *identical* bill the Works Board recommended "*by indorsement thereon*" it was no ordinance.

> Charter, Art. VII, § 2.
> City v. Corona Co., 37 Colo. 235.

It is to be noticed that this recital was not in fact a "*finding*" at all. Further, it does not state as *found* by the council, any of the *facts* required to be found by them in order to *cure* the admittedly defective *jurisdictional* charter procedure. It does not in any manner purport to make any "*finding*" authorized or required by Charter proviso "Eighth" to be made.

All this was alleged in the complaint (13) and found true by the trial court. The so-called ordinance *recital of a so-called finding*, was in fact really but the purest sort of bunco, and all without any investigation by the Council, or notice given by them, or op-

portunity of any kind for any body to of *right* appear before them, be heard by them as of *right* and dispute any of the alleged facts claimed to have been, or about to be, conclusively found by them by ordinance against him, as a means by which to deprive him of his property by confiscatory taxation.

I may as well quote in this connection from the late case of Town v. Eversole (Ky.), 96 S. W. 478:

> "A city council can only speak *by its records*, and its *records* read and signed are (can be) the *only* evidence of its action."

Tracy v. People, 6 Colo. 151.
City v. Sullivan, 11 Colo. 483.

The complaint alleges any paving improvements constructed were not at the official grades and were of *Bermudez* asphalt as the only wearing surface, on a smelter slag foundation and not in accordance with either of the so-called petitions or creating ordinance. (14.)

In re Sharp, 56 N. Y. 257.

The complaint further alleges, and Weber testifying from the records of the city clerk's office showed, that on January 4th, 1899, the city clerk published an advertisement providing only for objections *relative to the proposed apportionment* (near top p. 15, bottom p. 36) and that the property owners, including plaintiffs in error, within the 30 days allowed by the charter, § 30, and said advertisement duly filed written complaints and objections, not only *relative to the apportionment* but to the *jurisdiction* of the city as well, with the city clerk. (Complaint,

pages 15, 16 and Weber's testimony, pages 36 to 39.)

It is to be noticed that this advertisement *confines* complaints and objections to be filed, to complaints and objections "*relative to said apportionments.*"

The allegations of the complaint (p. 15), which the trial court after hearing all the evidence found to be true, which findings of fact the State Supreme Court does not disturb, respecting this alleged meeting and the action thereunder, are as follows:

> "That notwithstanding the same, the City Council of the City of Denver never met as a board of equalization for the purposes of hearing or determining said complaints and objections, and did not meet or pass upon the said complaints, protests and objections; that if the members of said City Council met at all they met as individuals merely, without any call from the mayor and *without* any call whatsoever, and without the knowledge or notice of any of these plaintiffs; that the call, if any there was for the meeting of such Board of Equalization, was not signed by the mayor until after some of the members of the City Council had pretended and assumed *without any call* to sit as a Board of Equalization and to pass upon and approve the assessment referred to in said notice published in the Republican of January 4th, 1900; that if the members of said City Council or any of them ever passed upon the said protests or objections, they denied the same *without*

notice or hearing to the protestors or objectors or any of them when they were not called or properly in session as a Board of Equalization and no call for them to sit or act as such Board had been signed by the mayor, and they pretended to deny such protests *solely and only on the ground that the same raised objections with which they had no right to deal;* that such protests, complaints and objections so filed, in addition to raising complaints and objections with which by reason of the same being jurisdictional, the City Council had no right to pass upon or to settle each raised complaints and objections to the amount of the assessment against each lot or the several plaintiffs, which the City Council, sitting as a Board of Equalization had a right to pass upon and which, under the charter and law, it was their duty to pass upon when properly in session under a proper call and sitting as a Board of Equalization, but which by the act of some of the members of said Council, as individuals aforesaid, claimed or pretended that the City Council had no right or authority to pass upon the same; all of which appears from the records of the City Council of the City of Denver, and all of which was done *without* the notice or knowledge of any of these plaintiffs or any of the objectors and *they did not nor did any of them have opportunity for any hearing*, nor were any of their complaints and objections ever passed upon or determined by

> the City Council sitting as a Board of Equalization, or otherwise. That the apportionment mentioned in the said notice was unfair and it was the desire and purpose of the plaintiffs to have said City Council sitting as a Board of Equalization pass upon the same."

The evidence of Deputy City Clerk Weber (36 to 41), testifying from the records of the City Council and that of Peter Koehler (42 and 43) and other testimony was relied upon by plaintiffs to support said allegations. Weber testified he was Deputy City Clerk; he produced and there was offered in evidence the published notice of the apportionment which stated, "That any complaints or objections that may be made in writing by the owners of said real estate, *relative to said apportionment*," will be heard and determined by the City Council sitting as a Board of Equalization. This notice gave 30 days from January 4, 1900, in which to file written complaints and objections *relative to said apportionment*. On January 26th, 1900, the plaintiffs in error filed their written complaints and objections claiming, among other things, their property was not benefited to the extent of the assessment against same, plaintiffs complaints and objections filed further claimed the city had no jurisdiction in the premises, "*that no petition subscribed by the owners of a majority of the frontage to be assessed was ever presented*," and gave other good and sufficient reasons why the procedure was void and unconstitutional, and the city, without authority to act at all in the matter of this alleged district. He testified from the city records that no opportunity for hearing property owners by

the Council at or prior to the enactment of so-called ordinance 57 was shown from the record. He was asked to take another book containing the later and remaining proceedings of the City Council in the matter of said alleged district, and to "read *everything* that appears there with reference to the Eighth avenue paving district; first get back to the beginning." In doing so he first read the alleged call as shown from said book and said that he did not know whether the original was signed by the mayor before or after the meeting was held (but Mr. Koehler later testified *that it was not signed until after the alleged meeting was held).* Mr. Weber continuing, read all the proceedings including the so-called meeting, showing 6 aldermen and 1 supervisor absent. He was then asked, "Were any (other) proceedings had on the Eighth avenue paving that day?" to which he answered, "Yes." Asked to read them, he read as follows:

"Supervisor Filius offered the following:

Whereas, *Complaints have been filed* by the various persons and firms as the owners of real estate included within the Eighth Avenue Paving District No. 1, of the City of Denver against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the City Clerk; and

"Whereas, No complaint or objection has been filed or made *against the apportionment* of said assessment made by the Board

of Public Works of the City of Denver, *but the complaints and objections filed deny wholly the right of the city to assess* any district or portion of the assessable property of the City of Denver; therefore be it

"Resolved, By the City Council of the City of Denver, sitting as a Board of Equalization, that *the apportionments of said assessment* made by said Board of Public Works be, and the same are hereby confirmed and approved.

"The resolution was adopted by the following vote: Ayes, Canon, Uzzell, Wilson, Filus, Bailey, Bennet, Coulon, Kelly, Lathan, Murray, Phillips, Scanlon, Golder (13), nays, none."

The following questions were then asked and answers given (testifying from said records):

"Q. That was acting on those protests? A. Yes, sir.

"Q. And the *only action had on these protests* which have been introduced in evidence? A. The *only* action had; yes, sir.

"Q. And that was the *only action had that day on the Eighth avenue pavement?* A. Yes, sir.

"Q. Or since? A. Yes, sir."

He stated that the proceedings which he read were the official record of the *only* action had *that day or since* on the Eighth avenue pavement. In other words, that the approving by the Council of the apportionment (which was a form of bill for an

ordinance sent the Council by the Works Board for the Council to enact into an assessing ordinance) and the overruling of the complaints and objections filed *relative to said apportionments* without considering those complaints and objections filed which questioned the sufficiency of the petition and went to the jurisdiction of the city to act at all *(because those were complaints and objections which the board considered beyond their power to pass on at that late stage of the proceedings)* constituted the assessment and adoption of the assessing ordinance, which was shortly thereafter published.

In considering the matters referred to in Koehler's testimony, it should be borne in mind that a meeting of the two boards of the City Council, together as a Board of Equalization, is a *special* meeting of the Council, and that the only charter provision respecting the calling of such meeting is:

> Art. 2, § 15: "The mayor may call *special* meetings of either board of the City Council, and upon the written application of a majority of the members of either board shall cause special meetings of such board, by causing 24 hours' notice in writing to be served upon the members thereof, and a copy of the notice thus served shall be entered upon the journal. The notice shall state the objects for which the meeting is called, and the business of such meetings shall be confined to the objects so stated; service of such notice shall be made by delivering a copy personally to each member, or by leaving a copy thereof at his usual place of residence with a member of his

> family over the age of 15 years. Service may be made by any police officer of the city of Denver, and his return thereon shall be *prima facia* evidence of service, as therein set forth."

If there was no legal call for the special meeting, the meeting of but a *portion* of the Council was of course the equivalent of no meeting of the Council at all. That the facts stated in Koehler's evidence were proper, and sufficient to void the alleged assessment, see:

> Habuberg v. Co., 31 Colo. 456.
>
> People v. Carver, 5 Colo. App., op. 161-2.

The body of the so-called assessment is set out in the complaint (17 to 19). By it the several and only properties of the plaintiffs in error in the district were assessed. I tabulate the allegations (16-17, 22-23) concerning plaintiffs' properties, their locations, values and alleged special benefits, together with the evidence (pages 43 to 48), showing that the effect of an enforcement of the assesments was to *confiscate*, without an equivalent in special benefits, the property as follows:

> Plaintiff *Londoner's* property was a 4-lot corner fronting 125 feet on Clarkson street by 108.08 feet on 8th avenue. The assessment for the 125 feet on Clarkson street frontage *(not paved)* was $93.34 and for the 108.08 feet frontage on 8th avenue *(paved)* $760.57, a total assessment of $853.91. The value of this property after the paving, the evidence shows to be $500 per lot or $2,000

for the four lots; benefit from paving but slight.

Plaintiff *Sheedy's* property was in three parcels. Lots 13 to 17 inclusive, in block 13 Emery's Capitol Hill (said lot 17 being but a fractional lot 10.83 feet front) fronting in the aggregate 110.85 feet on Pennsylvania avenue (not paved) with no frontage on 8th avenue, assessed $101.96. Adjoining and south of these four full lots and fractional lot was a small strip of land known as lot 17, block 13, Arlington Heights, 125 feet on 8th avenue by 10.04 feet on Pennsylvania avenue, assessed $1,023.41. Considering this fraction or strip separately, it is a clear case of confiscation, as full lots 25 by 125 feet are valued, after the paving, at but $500 (p. 48) and this fractional lot alone worth but $25 (pp. 47 and 48). Considering the whole corner 125 feet on 8th avenue by 120.87 feet on Pennsylvania avenue as one tract, the total assessment was $1,125.37, and the total value of the property, after paving, $2,500; benefit from the paving but slight.

Mr. Sheedy's other parcel is a small strip of land known as out-lot 50 in South Division of Capitol Hill fronting 125 feet on 8th avenue by but 4.8 feet on Downing avenue. It is assessed $827.28 for the paving, whereas the testimony (47) shows it absolutely valueless, or, at the outside, not worth to exceed $25, and not at all specially benefited by the paving.

The complaint alleges the unconstitutionality and violation of due process of law under the 14th amendment of said assessment itself, and of the several charter provisions of themselves and as applied to the procedure in this case, and after showing that by reason of the alleged assessment plaintiffs are hindered, delayed and prevented from enjoying, selling or otherwise disposing of their several properties above mentioned, setting up several other well-recognized grounds of equitable relief, and that the relief, if any there be, which might be obtained in a court of law, would be inadequate, incomplete and uncertain, and, if obtainable at all, would require a great multitude of suits and circuity of action, winds up with the usual prayer for an injunction and relief in equity. (19 to 26.)

From the decree of the trial court in favor of each of the plaintiffs the defendants appealed to the State Supreme Court where the case was reversed *with an order for judgment* for defendants. After the denial of plaintiffs' petition for a re-hearing (p. 57 to 60), said Supreme court entered judgment in favor of defendants and against plaintiffs for costs (p. 61), and the plaintiffs, after each severally excepting to the said several orders and judgment, bring the case here for the consideration of this court upon writ of error.

The opinion of the State Supreme Court as originally handed down (50-57) and on denying the application for re-hearing (p. 60 and 61) is contained in the Agreed Record and also reported in 33 Colorado Reports, 104.

It is to be noticed that the State Supreme Court does *not* attempt to disturb *any* of the *findings of fact*

of the trial court, but based its opinion *solely* upon the legal proposition that the complaint did not state a cause of action *because solely* of the alleged ordinance mis-recital, without any investigation, notice, right or opportunity for hearings, concluded the plaintiffs from ever showing the facts to be contrary to those fact recitals upon conceded *jurisdictional* points. In other words, conceding the facts to be as alleged in the complaint and found by the trial court to be true, defendants were nevertheless entitled to judgment *solely* because of said ex parte recital or so-called "finding" in the so-called creating ordinance.

The charter does not attempt to make the so-called assessments a personal charge against the owners, but only against the property. That is, the proceeding is somewhat in the nature of a proceeding *in rem*, without, however, affixing any lien on the property until after the assessment.

At the time of the decison of the case at bar, the State Supreme Court consisted of but three members, —Judges Gabbert, Campbell and Steele. Since then four additional members,—Judges Maxwell, Bailey, Goddard and Caswell, have been added, making seven judges now upon the court.

Assignment of Errors.

The assignment of errors plaintiffs will argue and rely upon are those numbered "First," "Second," "Fourth," "Fifth," "Sixth," "Ninth" and "Tenth," and are as follows:

"First: The Supreme Court of Colorado erred in holding and deciding that the portion of proviso

"Eighth," of Section 3, of Article 7, of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado April 3rd, 1893' (commonly called the Denver City Charter of 1893), which provided, 'And the finding of the City Council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal,' as construed by the Supreme Court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted (as construed) was drawn in question and denied by appellees in said cause on the ground of it being repugnant to the due process of law clause of the 14th Amendment of the Constitution of the United States, and in contravention thereof."

"Second: The Supreme Court of Colorado erred in assuming that said City Council ever made a finding by ordinance in accordance with said proviso 'Eighth.'"

"Fourth: That by the construction placed by the Supreme Court of the State of Colorado upon said proviso 'Eighth,' of Section 3, of Article 7, of the 1893 Charter of the City of Denver, the State of Colorado deprived the plaintiffs in error of their property without due process of law in violation of the 14th Amendment of the Constitution of the United States."

"Fifth: The Supreme Court of Colorado more

particularly erred in holding and deciding that the city authorities in following the procedure in the Eighth Avenue Paving District No. 1 of the City of Denver, Colorado, in the manner in which the record, evidence and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the 14th Amendment of the Constitution of the United States."

"Sixth: That by the opinion and the judgment and decree of the Supreme Court of Colorado in the case at bar the Supreme Court of said State acting in the name of and for said State, without due process of law, itself made what purports to be a law and, at the same time of making, enforced the same, thereby denying to the plaintiffs in error due process of law under the 14th Amendment of the United States Constitution, and depriving the plaintiffs in error of their property without due process of law, in contravention of the provisions of the 14th Amendment of the Constitution of the United States."

"Ninth: The Supreme Court of Colorado erred in upholding sections 29, 30 and 31, and each thereof, of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado April 3rd, 1893' (commonly called the Denver City Charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty and property of these several plaintiffs in error without due process of law in violation of both the State and Federal Constitution, and the 14th Amendment thereof."

"Tenth: The Supreme Court of Colorado erred in upholding each of the several assessments against the corner lots, and particularly those belonging to said Wolfe Londoner and Dennis Sheedy, because each thereof was assessed for the paving and other improvements in this district alone for more than the several lots so assessed were ever actually worth and far in excess of any special benefits received from the alleged improvements."

Said assignments numbered "Fourth" and "Sixth" were added, since the printing of the record, with the approval of counsel for defendants.

Provisions of Denver Charter of 1893.

ARTICLE VII.

PUBLIC IMPROVEMENTS.

Section 1. The city shall have power to contract for and make local improvements, and to assess the cost thereof wholly or in part upon the property specially benefited, as hereinafter provided; all contracts for public improvements shall be awarded by the mayor, upon the recommendation of the board of public works, and the improvements shall be constructed by and under the direction of said board, in accordance with specifications prescribed by said board.

In all cases when the cost of local improvements is to be assessed wholly or in part upon the property benefited, the same shall be constructed by independent contract or contracts; but other public improvements may be constructed by day's labor under the direction of the board.

Sec. 2. Whenever the board of public works shall by resolution order any of the local improvements herein mentioned, the same shall be authorized by ordinance; which ordinance shall be in form recommended by the board of public works by endorsement thereon, and shall not be subject to amendment by the city council.

Sec. 3. The board of public works may order the grading, curbing and paving or otherwise improving of the whole or any part or parts of any street or streets, alley or alleys or streets and alleys in the city of Denver, or any one or more of the said improvements. In case of grading only, or of grading and curbing only, the improvements may include the necessary crosswalks; and the board may thereafter, under the conditions herein prescribed, do such further grading as may be necessary in paving or otherwise improving the same area; Provided,

First. Before ordering the improvements mentioned in this section, or any of them, the board of public works shall adopt full details and specifications for the same, permitting and encouraging competition, determine the number of installments and time in which the cost shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed for the same, as in this act provided; and shall cause the engineer of said board to make a map of the district and an estimate of the total cost of said improvements, showing the approximate amounts that will be assessed upon each piece of real estate in the district; and no contracts

shall be let for any amounts exceeding the estimates of the engineer.

Second. The board shall by advertisement for twenty days in two daily newspapers of general circulation, published in the city of Denver, give notice to the owners of the real estate in the district, of the kind of improvements proposed, the number of installments and time in which the costs will be payable, the rate of interest on unpaid installments, the extent of the district to be assessed, the probable cost as shown by the estimates of the engineer, and the time, not less than thirty days after the first publication, when a resolution ordering the improvements will be considered by said board; that said map and estimate and all resolutions and proceedings of the board in the premises are on file, and can be seen and examined at the office of the board during business hours, at any time within said period of thirty days, by any person interested; and that all complaints and objections that may be made in writing concerning the proposed improvements, by the owner of any real estate to be assessed, will be heard and determined by the board before final action of the board thereon.

Third. If owners of a majority of the frontage to be assessed, shall petition for paving, and for any particular materials for the wearing surface, then the improvements shall be ordered, and the material so designated shall be used; but no paving shall be ordered unless a petition for the same is first presented, subscribed by the owners of a majority of the frontage to be assessed for the same; and in every instance the material shall be so described in

the specifications, either by standard or quality, as will admit of genuine competition between contractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other.

Fourth. If within the time specified in said notice, a remonstrance against the making of the improvements shall be filed with the secretary of said board subscribed by the owners of a majority of the frontage which is to be assessed, the improvements shall not be made, and proceedings shall not be renewed for six months.

Fifth. The resolutions and orders of the board of public works may be modified, confirmed or rescinded by said board at any time prior to the passage of the ordinance authorizing the improvements.

Sixth. The specifications for paving may include sufficient culverts or drains necessary to carry off the surface water of lands shedding their waters across the line of the street improved.

Seventh. The specifications may provide that bidders shall agree to enter into contract to do the work and maintain the same in good repair for a period of five years, and a contract may be entered into in accordance therewith, and

Eighth. If before any improvements authorized by this section, any piece of real estate to be assessed has already an improvement conforming to the general plan, the board and city council may make an allowance to the owner thereof, the same to be deducted from his assessment and from the contract price. And the finding of the city council by

ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid shall be conclusive in every court or other tribunal.

Sec. 4. In case of the improvement of any street as hereinabove provided, the cost of the improvement, except in the intersection of streets and alleys, and except the share to be paid by street railway companies, shall be assessed upon all the lots and lands abutting on the street improved, in proportion as the frontage of each lot or tract of land is to the frontage of all the lots and lands so improved, the sides of corner lots which sides abut on a street so improved being regarded as frontage; Provided That where the real estate abutting on the street improved consists of lots or lands which are not of substantially equal depth, then the same may be assessed to a substantially equal depth, not less than twenty and not more than one hundred and fifty feet from the street improved, as the same may be determined by the board of public works.

Sec. 5. In case of the improvement of any street, the cost of the improvements in each street intersection, except the share to be paid by street railway companies, shall be assessed upon all the frontage on the street improved, and on the intersecting streets within a distance of one-half block in each direction from such intersection in proportion to the frontage of each piece of real estate on the street improved or on any intersecting street, or on both, within said distance; and the cost of each

alley intersection shall be assessed upon all the real estate in the same block in proportion to the frontage on the street improved.

Sec. 6. In case of the improvement of any alley or alleys in any block, the whole cost in each block shall be assessed upon all the lots abutting upon the alley or alleys so improved in the same block in proportion to the frontage of each lot in the alley or alleys so improved.

Sec. 7. When any real estate is V shaped or of any irregular form the city council may upon the recommendation of the board of public works make such allowance in the assessment thereon as to them may seem equitable and just or may refuse to make any allowance; and in case of any unusual area or proportion of intersections the board of public works may order not exceeding one-half of the cost of such intersections to be paid by the city and the remainder only shall in such case be assessed.

Sec. 8. The term "street" as used in this act shall be construed to mean any street, avenue or boulevard in the city of Denver. The term "real estate" shall be held to mean all lands whether platted or unplatted, regardless of improvements. Lots may be designated in accordance with any recorded plat thereof, and unplatted lands by any definite description.

ASSESSMENT AND PAYMENT.

Sec. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof affording complete drainage for any part or parts of the

district and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein showing the whole cost of the improvement, or such parts thereof, including six per cent. additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this State made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

Sec. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city of Denver, notify the owners of the real estate to be assessed, that said improvements, have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

Sec. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints

and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned.

BONDS AND WARRANTS.

Sec. 43. All local improvements shall be paid for in public improvement bonds or warrants of the city of Denver, of such date and in such form as may be prescribed by the board of public works bearing the name of the street, alley or district improved, and payable to the bearer in a sufficient period of years after date to cover the period of payment herein above provided for but subject to call as hereinafter provided, in convenient denominations of not more than $1,000 each. All such bonds and warrants shall be issued by the city treasurer upon estimates and orders of the board of public works, approved by the mayor, without being audited by the city auditor or auditing committee, or allowed by the city council; and the city treasurer shall preserve a record of the same in a suitable book kept for that purpose; said bonds and warrants shall be subscribed by the mayor, attested by the city clerk and seal of the city and registered by the city auditor, with the approval of the president of the board of public works indorsed thereon; the same to be payable only out of the moneys collected on account of

the assessments made for said improvements, respectively; and all moneys collected on account of the assessments for any improvement shall be applied to the payment of the bonds issued for the same improvement only until the payment of all the said bonds; Provided, That said bonds and warrants may be used by the board with the approval of the mayor at par, in paying for engineering and other clerical services, and costs of inspection, and in case of viaducts and tunnels, in paying for any necessary rights of way; or with the approval of the mayor, the board may, upon advertisement for not less than ten days in some newspaper of general circulation, published in the city of Denver, and such other papers as may be approved by the mayor and said board, sell sufficient of said bonds and warrants and pay the expenses mentioned in this proviso in cash.

CONTRACTS.

Sec. 46. All contracts for local improvements, and all other contracts involving expenditures under the direction of the board of public works, shall be let by the mayor, upon recommendation of the board of public works, without any action of the city council, except in the passage of the original ordinance authorizing the improvement or contract. All such contracts shall be let to the lowest reliable and responsible bidder, after public advertisement by the board for not less than ten days in some newspaper of general circulation, published in the city of Denver. Any other mode of letting such contracts shall be illegal and void, and no such contract shall be made without a bond for its faithful performance, with sufficient surety or sureties to be approved

by the board, and no other surety than a surety company approved by the board and mayor shall be accepted, unless he is the owner of real estate in Arapahoe county in double the amount of his liability on all bonds upon which he may then be surety to the city. Upon default in the performance of any contract, the board may advertise and relet the remainder of the work in like manner without further ordinance, and deduct the cost from the original contract price; or, with the approval of the mayor, advance any excess out of public improvement fund of the city and recover the same by suit on the original bond. In all advertisements the board shall reserve the right to reject all bids, and upon rejecting all bids, may again advertise without further ordinance.

I sincerely trust that in the presentation of this case no language I may use in my zeal to save my clients their property and have corrected what I firmly believe to be a mis-interpretation most extremely perilous as a precident of the meaning of the term due process of law, will be or be by anybody construed as in the least disrespectful of the highest court of my adopted State. It is certainly not my intention to be disrespectful, nor to in any manner question the motives, of that court or any of its judges.

I concede their errors of construction and mis-interpretation of the judicial function,—if they were errors,—to be errors in the performance of what they conceived to be their duty. I trust that this court will consider and make due allowance for, any possible over-zeal on my part in the presentation of this case, as not intended to exceed any of those

proprieties of statement which should always be observed in speaking of courts.

Argument.

My contention is based upon those portions of the 14th Amendment which read:

> "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

I think a careful reading of the opinion and comparison of it with the City Charter and with the record in this case, will establish (I) that the State Court expressly *concedes* the assessments to be without jurisdiction and absolutely *void* except for proviso "Eighth" of § 3 of Article 7 of the City Charter, and further necessarily in fact *concedes* that said proviso read in its plain and unambiguous language, *as the legislature enacted it*, had not and could not have any application whatever to this case; (II) that in the name of construction, but by what in effect amounts to *legislation*, the language of said proviso was by said court through a misconception of judicial functions *altered to fit* the facts of this particular case; (III) that such *legislation* by the court in the name of the State was without due process of law, was unauthorized by any law, and in itself constituted a violation of one or both of said clauses of said amendment, to the great injury of my clients.

If correct in the above, I think that, *without more*, justifies a reversal. But I expect in addition to clearly show: (IV) that the re-constructed proviso was beyond the power of the State, even through

its proper channels, to enact because itself in direct violation of one or both of the above quoted clauses of the 14th Amendment; and (V) said proviso as so *re-constructed* was, in violation of one or both of said clauses of the 14th Amendment, *construed by the court as authorizing* an ex parte ambiguous recital in a void ordinance of an ambiguous finding without investigation, notice or opportunity to defend, of ambiguous facts from which (if, as the State court insists, any *inference* is to be indulged in) it either can or cannot, equally as desired, be inferred that the law either has or has not as desired, *in part* been complied with,—which recital as the court construes said proviso as construed may be contradictory of itself and contradicted by other equally conclusive recitals in the same record or in other record portions of the same statutory proceeding showing a total want of jurisdiction and failure of compliance with the law, to be when made conclusive on adversary property owners of its own validity, of jurisdiction, and of *full* compliance with the law; both the means and the necessary result being (VI) a taking by the State acting through its agents by virtue of public position of the property of plaintiffs in error without due process of law, and a denial to the said plaintiffs of the equal protection of the laws, in violation of the 14th Amendment of the United States Constitution.

While no one appreciates more fully than myself the existence of the well known rule that the construction placed by the highest State court upon a State statute is usually followed in the Federal Supreme Court, I most respectfully but earnestly submit that this rule, like all *general* rules, is sub-

ject to numerous exceptions and should be kept within its *terms* and those legitimate bounds of reason which prompted its ever being made a rule at all. This court has in substance declared that the scope of the rule by its very *terms*, as well as the reason for it, is confined to judicial *construction* and does not extend to judicial *legislation* pure and simple by State courts. It should not extend to that easy process of arbitrary usurpation of legislative power pursued as, I think, in this case of *adding* to, *subtracting* from and *substituting* for the plain and unambiguous language used by the legislature, words and groups of words, if not indeed whole sentences and paragraphs, entirely foreign to the disclosed and clear, unambiguously expressed legislative intent, thereby, as several times I submit appears from the opinion in this case, making a statute appear to say the direct contrary of what the legislature said it does say. It would indeed be a well-nigh impossible statute that could not be upheld by such a process.

"Where the language used by the legislature is free from ambiguity, there is no room for construction." To then attempt to construe is but to legislate.

Goodykoontz v. Acker, 19 Colo., 360, op. 366.

People v. May, 9 Colo. 81, op. 85.

Lake County v. Rollins, 130 U. S., op. 669-674.

Rogers v. Murray, 115 Wis. 267.

Nor does it apply where, as in the case at bar, the so-called construction renders the legislative enactment *as so construed* unconstitutional.

"The validity of a statute is drawn in question, whenever the power to enact it, as it *is* by its terms, *or as it is made to read by construction*, is fairly open to denial and is denied."

In reversing the Colorado case of Lake County v. Rollins, 130 U. S. 662, op. 673, this court said, it is the duty of all persons, including courts, to read a law "as it *is*, and not as it might have been."

In applying this same rule in reversing the Supreme Court of Alabama for attempting to *make* instead of *construe* a statutory provision, this court, in State Tonage Cases, 12 Wall. 204, op. 217, said:

"Legislative enactments, where the language is unambiguous, *cannot be changed by construction*, nor can the language be divested of its plain and obvious meaning."

That this court cannot be deprived of its lawful authority to review judgments depriving persons of life, liberty or property, without due process of law, or of an equal protection of the laws, in violation of the federal constitution by State action, see—

McGeehee Due Process of Law, pages 24 to 30.

Ex parte Virginia, 100 U. S. 339.

Yick Wo v. Hopkins, 118 U. S. 356.

Scott v. McNeal, 154 U. S. 34, op. 45.

Regan v. State, 154 U. S., op. 390.

Hovey v. Elliott, 167 U. S. 409, op. 417.

C. B. & Q. Ry. v. Chicago, 166 U. S. 226, op. 233 *et seq*.

Capitol Co. v. City, 72 Fed. 818, op. 821-824.

R. & T. Co. v. Equalizers, 85 Fed. 303, op. 317-318.

That the action of the State court is the action of the State, in addition to the above, see, also:—

Strader v. State, 100 U. S. 303.

State v. Rives, 100 U. S. 318.

Neal v. State, 103 U. S. 370, 397.

C. M. & St. P. v. Minn., 134 U. S. 419.

Raymond v. Traction Co. (U. S.), decided Oct. 12th, 1907.

In re Kelly, 46 Fed. 654.

That the municipality is a mere State agency, or instrument, and its acts are the acts of the State. "The General Assembly is practically omnipotent in relation to municipal corporations within the State" by the decisions of the State Supreme Court.

Colo. Constitution, Art. XV, § 2.

People v. Londoner, 13 Colo. 303, op. 308-9.

Carpenter v. People, 8 Colo. 116.

In re Senate Bill, 12 Colo. 188.

City v. Iliff (Colo.), 89 Pac. 823.

Johnson v. People, 6 Colo. App. 163, op. 167-8.

Brown v. City (Tex.), 75 S. W. 488.

I.

That the State Supreme Court expressly CONCEDES the assessments to be wholly without jurisdiction and absolutely void except for proviso "Eighth" of § 3 of Article VII of the City Charter; and further necessarily in fact CONCEDES that said proviso, read in its plain and unambiguous language, AS THE LEGISLATURE enacted it, had not and could not have any application whatever to this case.

The first part of this statement is emphatically proven by the later decision of said court, quoting from the top of page 108 of the report of the opinion in this, and applying said principle in the case of City v. Dunning, 33 Colo. 487, op. 492:

> "It is, no doubt, true, that conditions precedent, which the (statute) law points out shall be observed by city authorieties in ordering improvements, *must* be complied with, and that, as a general rule, their failure to do so does not give them jurisdiction to proceed."

See, also, the even later decision of the same court in

Ahern v. Board, (Colo.) 89 Pac. 963.

The last part of the proposition is perhaps best proven by the fact that the State court *did* legislate.

The holding and (except for this case) settled doctrine of the Colorado court from the start in assessment cases (consistent, at least, in this respect,) is that,—

> "The statutory *mode* of exercise prescribed *constitutes the measure of power* granted."

1881 Palmer v. Way, 6 Colo. 106, op. 110.
1884 Brown v. Denver, 7 Colo. 305.
1887 Keeze v. Denver, 10 Colo. 112.
1888 Sullivan v. Leadville, 11 Colo. 483.
1889 City v. Robinson, 12 Colo. 593.
1889 Wilson v. Chilcott, 12 Colo. 600.
1890 In re House Resln., 15 Colo. 598.
1890 Becket v. Cuenin, 15 Colo. 281, op. 284.
1892 Denver v. Knowles, 17 Colo. 204.
1897 Rhodes v. Bd. P. W., 10 Colo. App. 99.
1899 Evans v. Denver, 26 Colo. 193.
1901 Dumars v. Denver, 16 Colo. App. 375.
1903 People v. Sours, 31 Colo., op. 438.
1905 Denver v. Dunning, 33 Colo. 487.
1907 Ahern v. Board, (Colo.) 89 Pac. 963.

This case and those decided with it seem to furnish the sole *exception*.

The doctrine of the foregoing decisions may be summarized substantially in the following language, which is a quotation in substance:

> "Grants of power to make local assessments are *strictly* construed and must be *strictly* followed. It is a *rule* applicable to the corporate authorities of all municipal bodies, that when the *mode* in which their powers on any given subject can be exercised is prescribed by the charter, that mode *must* be followod. *The mode in such cases constitutes the measure of the power.* The objection (failure to subscribe and file the required *majority* petition, or to strictly comply with any other statutory condition precedent)

goes to the *origin* of the proceedings and is jurisdictional. The principles of estoppel can have no application in such a case."

The following quotation is from Becket v. Cuenin, 15 Colo. 281, op. 284:

> "It is an *established* principal in *all* courts that the method of acquiring jurisdiction by publication is in derogation of the common law, and that the statutory requirements must be *successively and accurately* taken to confer jurisdiction. * * * This principle has been so often decided and so universally declared, it is wholly unnecessary to cite authorities in support of the proposition."

The several particular *jurisdictional* preliminary steps alleged in the complaint and found by the trial court (none of which trial court findings of *fact* are disturbed by the State Supreme Court) to have been violated, were:

(A) Charter proviso "Third" of § 3 which imperatively declares "*No paving shall be ordered* unless a petition for the same is first presented, subscribed by the owners of a majority of the frontage to be assessed for the same."

The proviso also further reads:

> "If owners of a majority of the frontage to be assessed, shall petition for paving, and for any particular material for the wearing surface, then the improvements shall be ordered, and the material *so designated* shall be used."

The complaint alleged, the evidence clearly established and the trial court found, that no petition was ever filed designating for a wearing surface four (or *one* of four) asphalts mentioned in the works board advertisement. No majority *petition* was ever filed. Neither one of the two only petitions filed designated or mentioned in excess of three (or *one* of three) different kinds of asphalt for a wearing surface. The only two petitions filed were each small minority petitions, combined being subscribed by considerably less than the owners of a majority of the frontage.

The *first* of these two petitions filed was the minority petition filed May 24, 1897 (for convenience called the *Bermudez* or *Colorado Paving Co.* petition), which asked for a 2-inch wearing surface of either one of the three designated asphalts, i. e., Trinidad asphalt, *Bermudez* asphalt or Grizzly asphalt, on a 4-inch foundation at a cost not to exceed $2.35 per square yard. It said nothing whatever about *Alcatraz* asphalt. A proposed ordinance based on that petition was killed in the council, as testified to by Mr. Carpenter, the Slaydens and others, because of its being but a minority petition when filed, and most of the petitioners having withdrawn from it either before it was filed or before the city attempted to act on it. The action of the council killed and rendered void and nugatory that Bermudez petition for all purposes, and left the city without any petition whatever.

Vennum v. Village, 202 Ill. 423, 424.

Also see other authorities cited in "Statement of the Facts," on page 5 of this brief.

The second (and only other) petition ever filed was that filed January 18, 1898 (for convenience called the *Alcatraz* or *Hugh Murphy* petition), which asked for a 2-inch wearing surface of either one of three named asphalts, i. e., Trinidad asphalt, Pacific asphalt or *Alcatraz* asphalt, on a 6-inch base with a ¾-inch binder at a cost not to exceed $1.98 per square yard. It did not mention *Bermudez* asphalt.

That so-called *Alcatraz* petition was the purest kind of a fraud. It showed *on its face* name after name signed in identically the same handwriting. Some of the property on it was in the district and some (most) outside the district. Names on the Bermudez petition in one handwriting were on it in an entirely different hand. Perhaps this is as much as I am justified in saying without going outside the record, but each and all of those facts were shown from the petition *itself* when it was introduced in evidence by the city.

It was but a small *minority* petition, containing but 149 feet frontage not on the *Bermudez* petition, and was not signed by the owners of nearly as much frontage as that *dead* minority Bermudez petition. Long before it was filed most of the owners whose names were subscribed to it withdrew in writing as testified to by Mr. Brown and Mr. Hart. Mr. Hart secured a peremptory writ of mandamus from the District court several days *before* it was filed ordering the works board to recognize the written withdrawals filed and to desist from attempting to proceed under it.

The complaint alleged *all* ultimate facts and evidence supporting *each* and *every* one of these sev-

eral allegations was introduced. The trial court found *each* and *every* one of them to be true. All the evidence is not in the Agreed Record but it shows "each plaintiff and defendant introducing evidence supporting the several allegations of their own pleadings." It further shows the evidence in the Agreed Record to be in part only. I took the case to this court on the record proper, including the trial court findings and decree. Whatever testimony is shown from the Agreed Record was added because counsel for the city so desired it added, but the original testimony covered so many pages of abstract it was shortened up as the Agreed Record shows.

This evidence was all proper and did not *necessarily* contradict the so-called *finding* (rather *recital* in a *void* ordinance) of *unauthorized* found *ambiguous* facts from which the State court in its opinion says, "it *can* be inferred that the law in this respect has been complied with."

I confidently submit no court is authorized to infer facts which should *themselves* be of record. No court is authorized to INFER from OTHER facts not authorized to be found, those *specific* facts which the law requires shall THEMSELVES be found. And, were it possible to make the statement of this principle any stronger, the facts in this case furnish the basis. The facts said by the State court to have been *found* (but which the record conclusively shows were merely recited in a void ordinance) are facts from which no inference whatever as to compliance or noncompliance with the law in this particular respect is justifiable. They are *ambiguous*-merely-recited-alleged-facts from which an *inference* that "the law

has *not* in this respect been complied with" is exactly as justifiable.

The *recital*, (it does not even purport to be a finding), is that certain "petitionS" designating (whether separately or in the aggregate is not stated) any one of four different asphalts for a wearing surface (in the *aggregate* so subscribed) were presented. The only finding on this subject authorized is that "A" petition (singular) itself subscribed as required by proviso "Third" was first filed.

While the court concedes a finding of this essential charter required fact is necessary, it says it can be supplied by *conjecture*. "By *inference*" is the exact language used by the court, but the claimed-to-have-been-*found* (but really merely *recited* and shown not to exist) fact from which it *infers* this concededly *essential* fact was found (or concededly-essential-finding-made) is as different from the fact required as black is from white.

Can it, with the least show of justice or reason, be *conclusively* inferred from a mere *recital* that certain petitions designating either Trinidad asphalt, *or* Pacific asphalt, *or* Bermudez asphalt, or Alcatraz asphalt for a wearing surface were first presented subscribed by the owners of a majority of the frontage to be assessed for said improvements, that each petition designated *Bermudez* asphalt as a wearing surface, and that the any one petition which did so designate Bermudez asphalt was itself subscribed by the owners of a majority of the frontage to be assessed?

The real facts were, and were clearly proven to be, the contrary. The *inference* is wholly unsupported by the real facts alleged and proven.

I do not think it will be disputed as a sound and universally recognized proposition of law, that the city itself, as well as its limb, the city council, was at best but a tribunal of *special* limited jurisdiction, and that in order for the proceedings of the city up to that point to be of sufficient validity to authorize the council to act at all,—

> "It is requisite that the entire proceeding up to that point shows *affirmatively* upon its face a strict compliance with *all* the conditions made necessary by the statute to a valid exercise of the taxing power, and the omission of *any* such facts in the record will *not* be supplied by presumption."
>
> Hamilton Special Assessments, §§ 480, 418, 464.

Such is the consistent holding of the Colorado authorities concerning legislative as well as quasi-judicial functions, not only before but since the decision of the case at bar.

People v. Brown, 23 Colo. 425, op. 431.
Carnahan v. Seiber, 34 Colo. 258, op. 262.
Morris v. Bank, 17 Colo. 231.
Charton v. Toomey, 7 Colo. App., op. 305.
Charlton v. Kelly, 24 Colo., op. 274.
Sauer v. Town, 20 Colo. App. 365, 370-2.
Tracy v. People, 6 Colo. 151, op. 155.
O'Rear v. Lazarus, 8 Colo. 608.
Roberts v. Roberts, 3 Colo. App. 6.
Sullivan v. Leadville, 11 Colo. 483.

See, also—

Rich v. Town, 134 U. S. 632, op. 641.
Steinmuller v. K. C., 3 Kas. App. 45, op. 50.
Liebermann v. City, 89 Wis. 336.
Lathrop v. City, 119 Wis. 474-6.
Medland v. Linton, 60 Neb. 251, 260.
Allen v. City, 35 Ore. 420, op. 431.
Chamberlain v. City, 34 Oh. St., op. 566.
Mulligan v. Smith, 59 Cal., op. 236.
Knopfi v. Co., 92 Mo. App. 280, 292.

It is to be remembered the only petitions filed were proven to be void on their face. That each showed *on its face* they were but minority petitions merely.

It is also to be remembered that the city by its council had already once acted on the first or only *Bermudez* petition presented and found it insufficient and void. Carpenter's testimony showed that and the council's own records of that meeting necessarily showed it.

The record shows the contract was let for, and if any paving was laid, Bermudez asphalt was to be the only wearing surface.

It is also to be remembered that the ordinance recitals materially *alter* the recitals and contents of the works board resolution. The resolution recitals certainly fell far short from showing "affirmatively *upon their face* a compliance with *all* the conditions made necessary by the statute to a valid exercise of the taxing power," and the authorities just quoted

not only say *it is necessary they show compliance*, but also say "the omission of necessary facts" in the petition itself, or in any preliminary proceeding, in the resolution, or in the ordinance "will not be supplied by presumption."

The recital in the *resolution* as well as in the ordinance itself, is that certain (two entirely *different* antagonistic) "petitionS" (in the aggregate) subscribed by the owners of a majority of the frontage were first presented. This certainly does not comply with the charter requirement that "*no paving shall be ordered unless A petition*" (singular) *itself* so subscribed *is* first presented.

The prior proceedings showing the adopting of full details and specifications under the *Bermudez* petition, (which petition on *its* face, and especially in connection with the written withdrawals from said petition *before* the petition itself was filed on file with the works board at the time of the adoption of this resolution, and the defeat of the proposed ordiance under it *affirmatively* showed it was not and was conceded by the city and its council, not to be subscribed by the owners of a majority of the frontage to be assessed and the city and both its limbs therefore *without* any jurisdiction to act at all), and the subsequent amending and altering of those details and specification so as to include in the resolution *four* different asphalts, (when there was no petition whatever *on its face* or otherwise which included more than three asphalts) on the incoming of an *antagonistic* petition for different *materials* to be *laid* in a different *manner*, at a different *price*, (which Alcatraz petition *on its face* showed it was *not* a majority petition), certainly do not on their

face show a *compliance* with the provision of said charter proviso "Third," that the city shall act at all, *only* "if owners of a majority of the frontage to be assessed shall petition for paving, and for any particular materials for the wearing surface," and that "*no paving shall be ordered* unless a petition for the same is first presented, subscribed by the owners of a majority of the frontage to be assessed for the same."

The adoption of full details and specifications for paving at the original grade (without subsequent alteration of the plans as to *grade)* certainly does not affirmatively *on its face* show compliance with charter proviso "First" when it appears from other ordinances that grade was changed after their preparation. Other material variations from the statutory power quite as apparent and material are readily to be seen.

The passage of an even otherwise valid ordinance by the council containing a so-called "finding" (when neither the proceedings or the ordinance show any opportunity whatever for hearing property owners before the council), certainly does not comply with said proviso "Eighth" authorizing a finding by the council only "*after notice duly given*" by the council.

The recital in the *ordinance* "as by the city charter required" the same as "as provided by law" in the Sauer case—(being an *alteration* of and *addition* to the works board resolution which must be the basis for and is conceded to be jurisdictional to authority in the council to act at all)—is of course but a recital of a matter of *law* pure and simple, and under the decisions of the Colorado courts because

only a conclusion of law is valueless and can conclude nobody.

> Sauer v. Town, 20 Colo. App. 365, op. 367, 370, *et seq.*
>
> Hainer Mod. Law Mun. Securities, § 441.
>
> Katzenberger v. City, 121 U. S. 172, op. 176.
>
> Downing v. Ditch Co., 20 Colo. 546.

On page 370 of the Sauer case, *supra*, the court declared, concerning the recitals in the bonds, that they were "*as provided by law*,"

> "The recitals in bonds are binding only as to matters of fact and *not as to matters of law*."

And this especially so when non-compliance with the statutory provisions appears from the works board resolution itself, which resolution is conceded to be the basis for and jurisdictional to any action at all by the council.

When one considers the pleadings, evidence and opinion in this case, the materiality of these variances in the so-called "finding" claimed to have been *made*, from the "finding" *authorized*, is emphasized. There were *two* small petitions filed. They were antagonistic, different, separate and distinct petitionS. Each was but a small minority petition. In fact, the trial court found that the signers on both combined did not constitute a majority of the frontage to be assessed. The first was for Bermudez asphalt, the second for Alcatraz asphalt. One was to cost $2.35 per square yard, the other $1.98. The first was to be a pavement laid but 6 inches thick,

the last 8¾ inches thick. They were fighting each other, the parties controlling the latter material going so far as to secure a peremptory writ of mandamus against the city paving this street with the other material.

It affirmatively appears from the complaint, the testimony and the decree, as well as from the opinion, that there was neither hearing nor opportunity for hearing adversary property owners before the council making this recital in the creating ordinance.

Lawson gives as Rule No. 118, at page 652, in his work on "Presumptive Evidence," that even a *prima facie* (not to mention a *conclusive)* presumption "must be based upon a *fact*, and not upon *inference*, or upon another *presumption*." This universal rule was evidently overlooked in the case at bar, but fortunately for the man of property, not in,—

Lambert v. Shumway, 36 Colo., op. 352.
Rustin v. Co., 23 Colo. 351.
Ry. v. Bullis, 6 Colo. App. 64.
Graves v. People, 18 Colo., op. 181-185.
Meyer v. Berlandi, 39 Minn. 438.
State v. Diebolt, 54 Kas. 129.
Wantlan v. White, 19 Ind. 470, op. 472.
Voght v. State, 124 Ind. 358.

In the Rustin case, *supra*, and the Lambert case, *supra*, it was held "*facts* which should be of record cannot be proven by parol," or *by inference*. *Inference* (if ever justifiable at all) certainly must be based on *known* facts open to but one, not permitting two *opposite* constructions.

In the Bullis case, *supra*, it was declared "Presumption (or *inference)* cannot take the place of legal proof." Other Colorado authorities, from which I quote at length hereafter, are to the same effect.

Is it possible that the government can take a man's property, for taxation, and that taxation for *benefits* conferred on property instead of for the *necessities* of government), or for any other purpose, merely because it *infers* it has a right to do so? Has it not first to establish the right and show a *positive* law for its authority? And a compliance with *that* authority?

If, as the State court in effect says, it possibly in a conjectional sort of way "CAN *be inferred*" that the property owners did or did not do a given thing because it was recited the *works board* had done or attempted to do, something else, what indeed was the necessity of any provision for any *finding* or any ordinance whatever? What the necessity for any *certainty* whatever in the ordinance? Or that there be any ordinance? Or any record of any ordinance? Or any procedure? Or any law? Or anything else for that matter? Except, of course, a TAKING;—except in other words, the very *act* complained of. Why not, as the State court evidently did, *infer regularity of the whole thing from that?* It would be just about as logical. It is susceptible of equal *certainty*. Could it lawfully, in view of the provisions of the 14th amendment, be conclusively INFERRED from the mere *recital* of the claimed fact *that the council had attempted to enact an ordinance* that it had the right to do what it attempted; that the owners whose consent was *essential* by the law to jurisdiction *had*

given their consent; and that voluntarily; that their written majority *protest* constituted their voluntary consent; that the works board had done its duty and no more; that jurisdiction, and every thing declared by law *essential* to jurisdiction, existed; in short, that there was a law authorizing what was attempted and *that* law had in all respects been complied with by everybody!

In earlier days, as well as within the past few months, our State court said "No." But I submit with all confidence an affirmative of the above states the true and only logic of the reasoning in the opinion in the case at bar.

Surely if such a procedure as this can stand, it CAN BE CONCLUSIVELY INFERRED because the council *claimed* to have passed an ordinance *containing no finding* whatever THEY MUST HAVE MADE THE FINDING or they would not have acted. That the adversary property owners must have properly petitioned! That the works board must have had authority to act and must have acted! That the law must have been fully complied with! That there must have been a valid and sufficient law authorizing all to act as each did act! Authorizing the city to take as it has taken!

But that this is not the law certainly needs no argument. If authorities are necessary other later as well as earlier Colorado decisions furnish them in abundance:

Brown v. Denver, 7, Colo. 305.
Keeze v. City, 10 Colo. 112.
City v. Dunning, 33 Colo. 487.
Lambert v. Shumway, 36 Colo. 350, 352.
See, also, Colorado cases, *supra*.

The reasoning in the case at bar and the similar reasoning in the Dumars, Campbell, Jackson and possibly other cases, I submit with all due deference to the State court, amounts, in substance, to this: The statute law does not have to be complied with because the legislature did not necessarily have to require that kind of a statute; there does not have to be any statute authorizing action because it *can be inferred* there was statutory authority. I submit, it is but *half* a step further to say the constitution does not have to be complied with because its provisions can be CHANGED by constriction.

The text-books and reports, including those of Colorado (except only in this case and those decided with it) are unanimous that,—

> "The general disposition of the courts in this country has been to confine municipalities within the limits that a *strict* construction of the grants of powers in their charters will confine them; thus applying substantially the same rule that is applied to the charters of private corporations. The reasonable presumption is that the State has granted in *clear* and *unmistakable* terms all it has designed to grant at all."

Cooley Const. Lim. (7th Ed.) p. 271, *et seq.*, repeatedly cited in Colorado decisions. Again on page 565 of the same work the same author, whom rumor says was once seriously considered for elevation to preside over this great tribunal, declares:

> "In the construction of a charter, to be in doubt is to be resolved; and every resolution which springs from doubt is against the corpo-

ration * * * . If the usefulness of the corporation would be increased by extending its privileges, let the legislature see to it, but let it be remembered that nothing but *plain* English words will do it. This is sound doctrine and should be *vigilantly* observed.

The construction, or rather *legislation*, of the State court confers on the municipality a *new* power the city did not before possess. It is a new *grant* of an extraordinary power. A power to tax by *inference* and conjecture. The court says it may be *conclusively* exercised by inference against adversaries without notice or opportunity to defend in summary proceedings *in invitum*.

The above is, I confidently but very respectfully submit, the necessary result of the reasoning of this case, and equally the necessary reasoning in the Dumars v. City, 33 Colo. 94, City v. Campbell, 33 Colo. 162 and Jackson v. City (Colo.), 92 Pac. 690, opinions, written by the same learned jurist.

Those cases each involved the validity, under the due process of law clauses of the 14th amendment of charter § 34. Said section reads:

> "All special assessments for local improvements shall be due and payable within 30 days of the publication of the assessing ordinance without demand; Provided that all such assessments may, at the election of the owners, be paid in installments with interest as hereinafter provided. *Failure to pay* the whole assessment within said period of 30 days shall be *conclusively* held and considered an *election to pay* in such installments, on the part of all persons inter-

ested, whether under disability or otherwise. All persons so electing to pay in installments shall be conclusively considered and held as consenting to said improvements, and such election shall be conclusively considered as a waiver of any and all right to question the power and jurisdiction of the city to construct the improvements, the quality of the work, the regularity and sufficiency of the proceedings, or the validity or correctness of the assessment."

I argued in the Jackson case, that the applicability of said section was confined to "assessments made in pursuance of this article," but, as the opinion in that case shows, the court held it was not so confined.

I argued further in that case (as did also counsel in the Campbell case) that said section left the property owner without any right to "elect not to pay;" without any right whatever "to contest." The court added three additional words to the section, placing them after the words of the legislature "Failure to pay," and made the section read, "Failure to pay or bring suit" within 30 days.

The facts of that case were substantially identical to this, except this suit was brought within the 30 days, whereas that suit was not. That suit, in addition, expressly alleged the grossest kind of fraud. The works board records, exact copies of portions of which were inserted in the complaint, showed that after the ordering of the work by alleged ordinance and letting of the contract for a given price for a given character of pavement to be laid at a given grade on a given street 90 feet in width, the grades

were materially altered, the street narrowed down to 30 feet for the purpose of making the aggregate contract price not exceed the engineer's estimate of the total cost, the plans and specifications materially fraudulently altered and the following order to the contractor made by the works board:

> "You are directed to substitute a coarse slag base, 6 inches thick, composed of pieces averaging 4 inches in diameter (instead of 2 inches in diameter, on which the bids were received) for the 6-inch slag base required by the specifications as a base for macadam wearing surface for said pavement. For this work you will be allowed 30 cents per square yard additional to your contract price per square yard."

We alleged also (and it is self-evident) that the cost of crushing slag to 2 inches in diameter (required by the contract upon which the bids were received) was much greater than the cost of crushing slag to 4 inches in diameter; that many crushers had, in fact, been broken in attempting to crush slag to a 2-inch diameter. The complaint also alleged the petition, on its face or otherwise (and it showed for itself), was not "subscribed by the owners of a majority of the frontage to be assessed." That majority remonstrances were filed and repeated urgent, written and oral, objections and complaints made by plaintiffs at every step in the proceedings. If this court should desire to see the abstract and arguments in that case I have them with me.

I mention this as showing from what uncertain facts (rather what an entire absence and lack of facts) the court, in this case evidently as in those,

considered sufficient to justify a holding that "it CAN BE INFERRED" conclusively, the law was fully complied with.

Indeed, the principle is practically the same as that involved in the case of City v. Hayes, 28 Colo. 110. The facts in that case in substance were that in calling an election for the citizens to vote upon the question of incurring an indebtedness for the issue of Auditorium bonds, the question was submitted in the alternative. The election was carried by an overwhelming popular vote. The court declared the bonds void, stating in substance that no separate, single proposition was submitted upon which the minds of those voting could be said to have agreed. On page 115 the court, speaking through Justice Campbell, concurred in by Judge Gabbert and the other member of the court (Judge Goddard), says: "Voting for *all* combined is not voting for any *one* or more separately; and so the fact that a majority of the legal votes was cast for the 11 purposes enumerated * * * is not equivalent for any one of the 11 independent purposes." The soundness of the distinction is clear.

The theory the court adopted in the case at bar would permit of the combining together (as was, in fact, done in this case) of antagonistic petitions each opposed to the other. It would permit of a petition by "A" for asphalt pavement to be combined with the petition by "B" for macadam, and the petition by "C" for disintegrated granite or any other kind of pavement, although A, B and C might each separately be violently opposed to the material designated in the petition of each of the others. Two or three or more separate small minority petitions for

separate wearing surfaces could, by such a process, provided only there was a sufficient disagreement among the property owners petitioning as to what the material used for the wearing surface should be, to make up combined, a majority petition.

When logically reasoned out the Hayes case is pat upon this proposition involved in the case at bar. The Hayes case was followed by Judge Riner sitting in the United State Circuit Court for Judge Hallett in the case of Grant against the City of Denver—— Fed., in restraining the sale and declaring void $47 000 00 in water bonds, issued for the purpose of acquiring by purchase or building a water works to compete with the private corporation now supplying the city with that commodity.

Concerning the lack of a majority petition the opinion says: "The board of public works, it is true, would be *without jurisdiction* to take the preliminary steps in the absence of such petition."

(B) Charter proviso "First" of § 3, providing for the preparation and adoption by the works board of *full* details and specifications based on a duly subscribed and presented majority petition.

Rhodes v. Board, 10 Colo. App. 99.

(C) Charter proviso "Second" of § 3 provides for a works board advertisement based on said plans so based on a duly subscribed and presented majority petition.

I think a careful perusal of charter proviso "Third," and an examination of the case of Rhodes v. The B. P. W., supra, will disclose that the charter contemplates each petition must at least be in the

words of the charter, "A petition * * * subscribed by the owners of a majority of the frontage to be assessed." Otherwise, the property owners would be deprived of their charter right to designate of what the wearing surface of the pavement shall be. Neither of these petitions were majority petitions and had been killed in the council. It was *functus officio*.

The State court concedes this to be as I state, and says that in the absence of such A petition so subscribed the works board lacks jurisdiction to act at all.

(D) Charter proviso "Fourth," which provides: "If within the time specified in said notice, a remonstrance against the making of the improvements shall be filed with the secretary of said board, subscribed by the owners of a majority of the frontage which is to be assessed, the improvements shall not be made."

Such a remonstrance was so timely filed.

(E) Charter § 2, Art. VII, which reads: "Whenever the board of public works shall by resolution order any of the local improvements herein mentioned the same shall be authorized by ordinance, which ordinance shall be in form recommended by the board of public works *by endorsement thereon*, and shall not be subject to amendment by the city council."

The alleged ordinance in the case at bar was proved to the satisfaction of the trial court to be in fact *no ordinance* at all. This was so because of conceded lack of compliance with each and all (or in fact any of) the above charter requirements, and for the additional reason that the *alleged* ordinance dif-

fered from the "bill for an ordinance" in fact recommended "by endorsement thereon" by the works board. There was no "endorsement" on the form of ordinance claimed to be the creating ordinance in this district.

In other words, the council did not enact into an ordinance, so-called, the "*form recommended*" but an *altered* form.

On this particular point the court (bottom p. 108) says:

> "up to the time when the council acts upon their (the works board's) *recommendation* * * * the latter could be enjoined from presenting any recommendation to the city council."

I most respectfully submit that whatever power was granted was a *single* power granted the *City* as a whole. No power was granted to the *works board* as a *Board*. No power was granted to the city council as such. Neither the council or board was an independent entity. They were each but *parts* or limbs of the *one* entity, the City.

Neither the works board's resolution nor any of the prior procedure is even *prima facie* valid. As I shall presently show, no *lien* or *cloud* is *created* until an assessment. No cause of action *accrues* until after an assessment. Until *after* an assessment none of the prior procedure is even *prima facie* valid.

While perhaps it does not appear as clearly as it might in the late tax cases of Mitchell v. Titus, 33 Colo. 386, Mitchell v. Pearson, 34 Colo. 278, and City v. Dunning, 33 Colo. 487, a careful examination of the opinions, and especially of the Abstracts of

Record in those cases, will disclose that the ground for holding the creating ordinance and subsequent proceedings based thereon *void* in those cases was a failure of the local bodies to *comply* with the required *preliminary* statutory procedure.

> "Without a *valid* creating ordinance there is nothing on which the proceeding can rest."
>
> Denver Charter, Art. 7, § 2, and proviso "Third" of § 3.
>
> Clark v. Chicago, 185 Ill. 354, op. 365-7.
>
> Mitchell v. Titus, 33 Colo. op. 387.
>
> Denver v. Dunning, 33 Colo. 487.

Without a *valid* works board *recommendation* there is nothing on which a valid *ordinance* can rest; without a *valid majority petition* there is nothing for the Works Board to *resolute* on.

For these reasons the so-called creating ordinance was *itself* void. Without a valid and regular works board resolution there was no jurisdiction in the council to act at all. The so-called ordinance was therefore void.

> Charter Art. VII, § 2; also proviso 3 of § 3.
>
> Vennum v. Village, 202 Ill. 423.
>
> Joyce v. Barron, 67 Oh. St. 264, op. 277.
>
> Holland v. City, 11 Md. 186.
>
> Batty v. City, 63 Neb. 26; s. c., 88 N. W. op. 141.
>
> Hawkins v. Horton, 91 Minn. 285.

"Statutory directions as to the mode of procedure to be followed in the enactment of ordinances are *mandatory* and must be strictly observed. They are conditions precedent and if omitted the ordinance is *ab initio* void. The statutory mode becomes the measure of the power, and all enactments must be passed in strict *subordination* to the *conditions* and *directions* prescribed. The compliance must be literal, not merely substantial. *When a power is granted to be exercised in a particular manner, or through specific means, there is an implied prohibition upon the exercise in a different manner, or by different means*, and the corporation cannot so legislate as to alter the mode of the exercise of that power or to change the persons who may exercise it. * * * It might be that some of the prescribed formalities seem wholly useless, or that omission to observe them could not possibly prejudice the rights of any one; but the obligation to follow them would be just as imperative. All exercise of discretion is precluded between the expressions of the legislative will."

Horr & Bemis on Mun. Ordinances, § 35.
Sullivan v. City, 11 Colo. 483.
Tracy v. People, 6 Colo. 151.

Keeze v. Denver, 10 Colo. 112.

The reasoning in the case at bar is the direct opposite of that in all prior cases as well as to that in the Ahern case, *supra*, recently decided by that *division* of three members of the present court in which sit the three same identical judges who decided the case at bar. Also of all the prior decisions of the court.

The court in its opinion intimates, neither the works board or council was exercising *judicial* functions. While it is not especially material in this case, I desire to call attention to the fact that by Mills' Colorado Code, § 297, the writ of *certiorari* is confined to cases where the inferior tribunal is "exercising *judicial* functions." This is the only provision for writs of *certiorari*, except that in II Mills' Colorado Statutes, § 2699, which is in terms expressly confined to Justices of the Peace. Further than this, by § 1 of Article VI, Colorado Constitution, the exercise of all *judicial* power is confined to the *courts*. That a writ of *certiorari*, even, would not lie either to the works board or council, see,—

People v. Court, 6 Colo. 534.

Another conclusive answer why *certiorari* would not lie, is of course the one already given, that no

lien or cloud was *created*, and until this happened no cause of action *existed*. The plaintiffs in possession were under no obligation, even if they could act against, to notice void or even valid proceedings creating no lien or cloud.

More will be said on this point in the general discussion toward the end of this subdivision I of this brief.

It is sufficiently alleged the plaintiffs were in possession,

Phillippi v. Leet, 19 Colo. op. 253.
Mitchell v. Titus, 33 Colo. 886.

(F) No valid creating ordinance existed.

This is sufficiently shown from (E) and the previous points made. It is, of course, unnecessary to add that the ordinance being void, all proceedings it attempted to authorize were equally so.

(G) Charter proviso "Eighth" of said § 3 requires that whatever findings the council is authorized to make in pursuance of the authority of said proviso must be by *valid* creating ordinance, and "*after notice duly given*" by the council. That the finding authorized must also, in addition, state that it is "*after notice duly given.*"

One of the allegations of the complaint (13) and findings by the trial court concerning this so-called ordinance "*findings*" was as follows:

> "That notwithstanding the recitations in said so-called *(void)* ordinance 57 that certain findings of fact were made by the city council, *no findings were, in fact, ever made by the city council by ordinance or otherwise recited in said ordinance at all;* that no hearing or opportunity for hearing of any kind before said city council, or either body thereof, or any committee of either body thereof, was ever *had or permitted*, and neither the said petition of property owners, or any of the preliminary or other proceedings in the matter of said alleged district, or any evidence of any proceedings claimed to have been had or taken place were before said council, or either branch thereof, or any committee of either branch thereof, at or prior to the enactment so-called of said so-called creating ordinance; *and the so-called findings were not in truth or in fact findings at all but purely ex parte recitals, without hearing or opportunity for hearing, or any investigation whatsoever by said council or any of the members thereof*, and did not and do not constitute due process of law, but are and each thereof is wholly illegal, unauthorized and void."

One power in a city to pave cannot exist as a single power, which is itself conditional on independent entities over whom the city has no coercive control petitioning, and at the same time be unrestricted by the lack of the required petition.

Proviso "Third" of said section 3 of the charter mandatorily says: "If the owners of a majority of the frontage to be assessed shall petition for paving, and for any particular materials for the wearing surface, then the improvements shall be ordered," and our State courts have expressly held that upon the property owners complying with this provision of said proviso the city authorities may (in the absence of other and purely discretionary reasons for not ordering it) be *mandamused* to order the paving:

Rhodes v. Denver, 10 Colo. App. 99.
Board v. Hayden, 13 Colo. App. 36.
Mayor v. Hayden, 13 Colo. App. 51.
Board v. Denver Tel. Co., 28 Colo. 401.
Hover v. People, 17 Colo. App. 375, op. 390.
Alkire v. City, 1 Colo. Dec. Supp. 277.

The proviso then proceeds as follows: "But no paving shall be ordered unless a petition for the same is first presented, subscribed by the owners of a majority of the frontage to be assessed for the same."

This leaves the decision of whether or not any paving shall be ordered with the property owners. Without their consent no paving can lawfully be ordered.

The State Supreme Court expressly concedes in

the opinion that this power to order paving is not a discretionary power in the city, its council or its works board.

They say that in the absence of the required majority petition and preliminary procedure, the works board "could be enjoined from presenting any recommendation to the city council," and that in the absence of any works board resolution the council could be enjoined from acting.

The trial court specifically found, and the State Supreme Court does not deny, there was no works board resolution; that what purported to be a works board resolution was void, and was presented to and adopted by the council in express violation, not only of charter provisos "Third" and "Fourth," but in express violation of charter § 2 as well.

Black cannot be transformed into white, nor a fact altered by mere legislative fiat. A small minority petition is still but a minority petition, notwithstanding a legislative declaration that it is a majority petition.

> Scott v. McNeal, 154 U. S. 34, op. 39-45.
> White v. Tacoma, 109 Fed. 32, op. 34.

And this, especially, when the declaration is by a subordinate tribunal instead of by the legislature itself.

> "It does not belong to human power to make that which is false true, by declaring it to be so."
>
> 2 Morawetz on Corp. (2 Ed.), § 925.
> Hill v. Swingnigly, 159 Mo. 45, op. 50.
> Homan v. Handlin, 59 Mo. App. 490, 492.

So. Highland Co. v. City, 172 Mo. 523, op. 533.

Hunscomb v. City, 11 Neb. 37, op. 42.

Bloomington v. Co., 134 Ill. 457.

Yates v. City, 10 Wall. 495, op. 505.

It is to be noticed that this proviso "Eighth" does not, as the legislature enacted it, in fact purport to not require, or, without notice and hearings, dispense with a majority petition. The city charter, as the State legislature enacted it, not only expressly requires the presentation of such a petition and mandatorily declares that without such A petition, so subscribed, "no paving shall be ordered," but authorizes an ordinance finding, "after notice duly given," and hearings before the council, and a finding among others that such a petition, so subscribed, was, in fact, first presented. I claim the council finding is binding only on the city. But, however that may be, the power to pave is based upon petition existing, or, after hearings, found to exist. Any paving proceedings not showing there was a majority petition, would be void. That is the exact fact here. Where, in this entire proceeding, from first to last, does it either literally or in substance appear that "A petition for the same is first presented subscribed by the owners of a majority of the frontage to be assessed for the same." In the absence of the required majority petition, neither the city or either of its limbs, the works board or the council, is empowered to act at all.

To convince the court that I am absolutely correct in my statement that the proceedings are based upon a majority petition, let us stop for a moment

and see what would be the effect of a recital made by ordinance, or alleged ordinance, that no petition existed. Would the proceedings under those circumstances be valid.

This brings the question right down to this, does the charter contemplate that such paving proceedings shall be based, presumptively at least, upon a majority petition, or not?

I do not believe that this court or my opponent will seriously contend that a duly published and otherwise valid creating ordinance which affirmatively stated in substance, "that no majority petition was ever signed or presented by any property owners in the district hereby attempted to be created, and no works board procedure was ever had, or opportunity for hearings afforded by the council before enacting this ordinance," and then proceeded further to say that nevertheless the city council does hereby, contrary to the actual fact, by ordinance find that "a petition for said improvements, subscribed by the owners of a majority of the frontage to be assessed, was first presented," etc., would conclude anybody.

Yet, is not this the very proposition upon which the city must stand or fall in this case?

I have shown the ordinance just supposed would come just about as near to showing a compliance with the city charter as does the so-called ordinance in the case at bar.

If I am correct in my assumption that the hypothetical ordinance just mentioned would confer no jurisdiction upon the city, to pave and assess at the cost of the abutting property owners, I have certainly conclusively established that this charter proceeding is based upon a majority petition and not

upon a discretionary power in that limb or instrument of the city known as its council.

In other words, the required petition must either exist or, after hearings and investigations, be found so to do.

Concededly in this case no such petition, in fact, existed. Any mere recital that it existed could not alter the fact that it did not exist. There was no hearing, or investigation by the council and consequently no finding. Consequently there was no power or jurisdiction.

The existence of such a petition, existing or found to exist, was jurisdictional to any power in the city to act at all, to create a lien by which the property of the plaintiffs might be taken from them. The property rights of the plaintiffs were involved. If the necessary majority petition existed, the city had the power to create the lien against the plaintiffs' property and take that property to discharge that lien. If it did not exist, unless the plaintiffs could be estopped in some way from showing it did not exist, the city could not do so. There was a fact,—the existence of which was the basis of any power of the city to act at all or affix any charge upon and take the property of the plaintiffs,—to be determined. It was a fact in itself involving no elements of discretion, expediency or policy. It was a question of pure fact unadulterated.

How are questions of pure fact conclusively determined? Are they conclusively decided by the mere recital of their existence by claimants? They are always judicial or at least quasi-judicial questions. Their determination involve judicial elements,

and they can only be determined after notice and opportunity to defend.

It is conceded, as this court has said, the State Legislature could, within bounds without hearings, itself determine the extent of the district, the amount and apportionment of the charge on property benefited. But this is because within bounds, all these are discretionary legislative matters.

It could not determine conclusively a question of pure fact. Its mere declaration could not alter the fact.

This court has repeatedly declared that where the legislature does not itself determine these purely discretionary matters of apportionment but commits their determination to a municipal council, or other subordinate administrative or legislative board or commission, "the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing" before the subordinate body making the conclusive decision.

Parsons v. District, 170 U. S. op. 52.
Spencer v. Merchant, 125 U. S. op. 357.
Fallbrook v. Bradley, 164 U. S. op. 167.
French v. Barber Co., 181 U. S. op. 337-341.

It has been too many times held by this court to be now questionable that even these primarily legislative questions of benefit and amount of benefit cannot be conclusively determined by subordinate tribunals without hearings.

If, (as this court has repeatedly said in the above and other authorities), this is true respecting

questions of the extent of the district, apportionment, benefits and other questions of legislative discretion, how vastly much more applicable must it be respecting a jurisdictional question of pure fact, such as that involved in the case at bar. If the subordinate tribunal must afford hearings in order to conclusively determine such questions of legislative expediency, it certainly must afford hearings respecting *quasi*-judicial questions of pure fact, such as the existence or non-existence of a petition, and whether or not that petition is in fact subscribed by the owners of a majority, or by but a minority of the frontage, before making a conclusive finding or decision respecting it.

The character of a question, (i. e., whether it is legislative or judicial) does not depend upon the body that prescribes it. The legislature is as competent to prescribe *quasi*-judicial conditions precedent to power as the constitution. It depends upon whether or not the condition prescribed is a question of fact, or a question of discretion merely. The question of whether or not a given petition is subscribed by a given number of people is a question of the purest fact. Its determination involves no elements of discretion. All questions of pure fact are judicial or *quasi*-judicial questions. That is, they cannot be conclusively determined without investigation, notice and opportunity to defend.

People v. Van Horn, 20 Colo. App. op. 230, approved in

Rio Grande Co. v. Catlin, (Colo) Pac., recently decided but not yet reported.

Benson v. People, 10 Colo. App. 175.

People v. Denman, 16 Colo. App. 337.
Rhodes v. Board, 10 Colo. App. 100.
Carter v. City, 16 Colo. 534.
City v. Heath, (Colo.) 88 Pac. 459.
Co. v. Minnesota, 134 U. S. 418.

On page 230 of the Van Horn case, *supra*, the Colorado court, speaking through the able judge Maxwell, said:

> "It will be noticed that these statutory provisions confer upon the district board of directors, the county superintendent of schools and the State board of education, the power to decide questions of law and fact, and says unless an appeal be taken from the decision the decisions of that officer become final, and if an appeal shall be taken, then the action of the county superintendent of the State board becomes final. To hold that such judgments or decisions are final in the sense that they are not reviewable by the courts, and that no judicial inquiry into their correctness, can be had, would be to hold that these three officers of the executive department, the superintendent of public instruction, secretary of state and the attorney general, by the statute granting an appeal to them, have been vested with powers properly belonging to the judicial department, which would be clearly repugnant to § 1, article 6 of the Constitution of Colorado, which vests the judicial power in the courts therein enumerated."

That all questions of fact, not involving discre-

tion in the tribunal authorized to determine them, can be determined only after notice and opportunity to defend.

Thorp v. Woodman, 1 Mont. 168 op. 170, 171.

Riddell v. Court, (Mont.) 85 Pac. 367.

Christy v. City, 13 Okla. 585.

Fitch v. Board, (Mich.) 94 N. W. 953 op. 954.

Creote v. City, 56 Ill. 422, op. 427.

Ames v. Co., 11 Mich. 139 op. 147.

State v. Ryan, 182 Mo. 349.

In Benson v. People, *supra*, the Colorado court, speaking through its great Judge Thomson, said in substance, that where the legislature has made the power to act discretionary with the party or body acting, he or it may act without notice or opportunity to defend; but where the legislature has made the power to act dependent upon some specific cause "there must be something in the nature of a judicial investigation of the (cause) charge; notice must be given * * * of the time and place for hearing" and an opportunity to defend afforded.

The Carter case, *supra*, is to substantially the same effect.

That is substantially the case here. While the power of the legislature to delegate power to municipalities was possibly, to a limited extent, a discretionary power so far as the legislature itself was concerned, (the same as was its power to remove statutory officials), the power granted in those cases was no more than in this, not discretionary power so far

as concerned the grantee. Its exercise being limited to a specified cause, it could not be exercised without cause.

In other words, while it might have been discretionary with the legislature to grant or withhold any power, the exercise of the power in fact granted was not discretionary with the city, its works board or its council.

"The mode of exercise prescribed is the measure of the power granted."

Concededly by the opinion in the case at bar, the power granted was to be exercised only for a specified cause. The specified cause was the request of property owners for paving of a designated kind by petition subscribed by the owners of a majority of the frontage.

Whether the specified cause existed or not is, under all the authorities, a judicial or *quasi*-judicial question. As the Colorado Supreme Court said in the Carter case, *supra*, where the power to act is restricted to a specified cause for action "an inquiry would be necessary" to determine whether or not the specified cause existed, and notice of the time and place of hearing and opportunity to defend must be afforded the adversary party.

It may be conceded that if the city's charter power to pave and assess private property was a purely unrestricted discretionary power to be exercised without any preliminary procedure whatever, there would be no *quasi*-judicial question of fact to determine.

But that it was not an unrestricted discretionary power is expressly conceded by the opinion of the State court as well as expressly stated in the lan-

guage of the act that "no paving shall be ordered unless a petition for the same is first presented subscribed by the owners of a majority of the frontage to be assessed for the same."

If it was an unrestricted discretionary power, it could have been enjoined at no stage of the proceedings. But the opinion says "it can be enjoined." Consequently it could not have been an unrestricted discretionary power.

The existence of the required majority petition is the very essence of the power granted.

The authorization for a conclusive finding upon the question of whether or not there was in fact a majority petition, but emphasizes the really undisputed fact that the power is not discretionary.

Even had the charter not expressly said that the finding should only be made "after notice duly given," it was a question of fact, (not of mere pleasure or discreetion), to be determined.

The Colorado authorities just cited say that the determination of questions of fact are *quasi*-judicial (if not indeed judicial) in nature, and that all *quasi*-judicial functions require notice and opportunity to defend.

In its delegation of power to the city council, the legislature in the clearest and most explicit language possible made the presentation of a petition in fact subscribed "by the owners of a majority of the frontage to be assessed", and the designating by them of the particular material to be used for a wearing surface, the very essence of the power granted. It was the sole cause authorizing any action by the city. It was a jurisdictional pre-requisite condition precedent to any power of the city and its

council to act at all. "No paving shall be ordered", it positively said, without such a petition so subscribed. As construed by the Colorado Supreme Court, it further said,—not that a finding after notice and *quasi*-judicial inquiry by the council,—but, without any notice or inquiry whatever, the mere ambiguous recital by the subordinate city council, of the fact (or any ambiguous fact from which it can or not as desired, be inferred it had or had not found) that but a portion of the facts declared by the legislature essential to jurisdiction existed, concluded the property owner from showing that the balance of the essential facts did not exist and rendered his property subject to confiscation.

This decision clearly conflicts with the federal improvement decisions cited.

A mere recital that specified facts essential to jurisdiction exist, can never bind an adversary. An adversary power or essential pure fact can never be created by mere recital.

Cooley Const. Lim., (7th Ed.) 139.

Portland v. City, 65 Me. 120.

Bennett v. Davis, 90 Me. op. 106.

Keller v. Hawk, (Okl.) 91 Pac. 778.

Mulligan v. Smith, 59 Cal. 206, op. 230, 237, 238, 240, 242, affirmed in

Ziegler v. Hopkins, 117 U. S. op. 667-8.

People v. Sours, 31 Colo. op. 421.

Goodykoontz v. Acker, 19 Colo. 360 op. 366.

Platte Co. v. City, 2 Colo. App. 184.

Yates v. City, 10 Wall. 498, op. 505.

Judge Cooley, *supra*, says:

> "Nor is it in the power of the legislature to bind individuals by a recital of facts in a statute, to be used as evidence against the parties interested."

The Supreme Court of Colorado long since adopted this doctrine in Goodykoontz v. Acker, *supra*. That was a mandamus suit by Acker against the State Auditor to compel the issuance of warrants for his salary as mine inspector. The statute on which he relied recited, "Whereas an appropriation for the salary and expenses of said officers was made in said act, approved April 1, 1899," when the fact was the contrary. On page 366 the Colorado Court says:

> "It is well settled that recitals even in the body of such an act (private) bind no one except those who applied for it. Moreover, a mere recital of fact or law in a public act is not conclusive upon the courts, while such recitals if found in a mere preamble are of still less weight."

In Platte Canal v. Denver, *supra*, the court went even further and said:

> "The recital in an ordinance that 'public welfare and safety require' an act to be done. (in that case the boxing and confining of a ditch) is not conclusive upon the judiciary. Courts are not bound by mere forms, nor are they to be misled by mere pretenses."

In the resent case of Keller v. Hawk, *supra*, the

Oklahoma court, concerning a tax-deed, said:

> "Such authority cannot be exercised to overcome by false recitations * * * the record upon which it is based."

In Yates v. Milwaukee, *supra*, which was a case in which the city attempted to abate and remove plaintiff's wharf, after passing an ordinance declaring it a nuisance, this court, speaking through Justice Miller, on page 505 said:

> "The mere declaration by the city council of Milwaukee that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."

Where, in this entire proceeding, has the legislature itself declared this particular petition a majority petition? Nowhere, certainly. Even did it lie in the power of the legislature to itself make such a mere declaration by it conclusive of the fact, (which I very much doubt), it must be conceded that the legislature itself has not done so.

The decisions of this court above cited say that where the legislature itself does not define the district or property benefited, even as to these primarily legislative questions of apportionment, "the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing."

The State court, on the other hand (op. 121), says directly the contrary, i. e.:

> "It is urged we erred in holding that the findings of the city council without notice or opportunity for the tax payers to be heard on the sufficiency of the petition was conclusive upon the property owners. Findings on questions of fact touching matters inherently jurisdictional would not be conclusive without notice and opportunity to be heard, but ex parte findings with respect to steps which the charter prescribes, and which are not required because of any constitutional provision, are final when the charter so provides. Were it not for the provision in the charter authorizing the municipal authorities to find ex parte on the sufficiency of the petition, no doubt such finding, in the absence of notice to the tax payers, and opportunity to be heard, could be attacked collaterally, but as the finding relates to a matter which is not inherently jurisdictional (i. e., was not required by any provision of the constitution), and as the charter authorizes it to be made in the manner it was, the facts upon which it is based cannot be questioned. The authorities cited by counsel do not hold to the contrary. Mulligan v. Smith, 59 Cal. 206; Ziegler v. Hop-

kins, 117 U. S. 683, and Miller v. City of Amsterdam, 149 N. Y. 288, are cases holding that findings of fact by the municipal authorities without notice to the tax payers were not binding upon the latter, but it will be observed that in each of these cases the city authorities were not authorized to determine the questions ex parte."

No case is cited to sustain the above statement of the opinion. There is, in fact, no case (other than the one at bar and those decided with it) to be found in the whole length and breadth of the reports of the jurisprudence of any of the United States of America where the decision by a city council or other subordinate tribunal, without affording hearings, of the question of whether or not a majority petition or other required statutory condition precedent to power not involving mere discretion in the tribunal making the finding, has been upheld. I have carefully examined the cases and know whereof I speak.

In re Kiernan, 62 N. Y. 457, is not such a case, for on page 461 it shows that the legislative enactment required that before the council made any finding, "a notice must be published stating a time for a hearing." The same is true of Dennison v. City, 95 Mo. 416, referred to in the opinion. I have not seen In re Michie, 11 Upper Canada, C. P. 379, but the legislative power in Canada, like the power of Parliment in England, is practically omnipotent, so that whatever that case may decide, it would not be applicable to a written constitution limiting the legislative power, as well as the executive and judicial powers, to conformity with "due process of

law." Of course, if the power is an unrestricted purely discretionary power in the city, that is a different matter. I doubt very much if such a power would not itself be so arbitrary as to be declared unreasonable and oppressive. But that is not the question for determination here, for the State court says the exercise of this power "can be enjoined," so necessarily it is not unrestricted or discretionary purely.

By the express concession in the opinion that the power is not a power discretionary in the city or its council to act or not act in the absence of a majority petition and the other required preliminary procedure, it becomes not a question of the power of the legislature to itself dispense with its own requirement, but it becomes a question of the power of the subordinate city council to dispense with legislative requirements. Even as to the power of a municipality or legislature to dispense, without notice, with a self-imposed condition, such as the requirement of a majority petition, notice, hearing and the like, to the exercise of its own power as against ADVERSARIES, Judge Elliott, in his work on Roads and Streets (2 Ed.), § 575, says:

> "Nor can it be justly said that the body having the power to impose the requirement has a right to dispense with it, for the property owners are in a position analogous to that to third persons with rights of such a nature as to entitle them to protection, although they may not be vested rights in a strict sense of the term."

Judge Cooley, in his great work on Taxation (3 Ed.), p. 517, says:

"The general rule has often been declared, that the legislature may validate retrospectively the proceedings which they might have authorized in advance. * * * But there are probably some exceptions to this general rule. If the law has afforded the party an opportunity to be heard, when it might have been dispensed with, he has a right to rely upon this for his protection, and we should doubt the right of the legislature to take it away * * *. If this can be dispensed with by a healing act, the very provisions for a notice for the party's protection becomes a trap for his distruction."

See, also, Colorado decisions cited, *supra*.

The reports of the Supreme Court of the State of Colorado is perhaps the best place to look for exceptions to the above rule. The fact is according to those reports, the exception in Colorado seems to be universal and the rule limited to this case and those cases decided with it.

The ground upon which the State Supreme Court by the aid of judicial legislation, pure and simple, sought to uphold the constitutionality of this reconstructed proviso was evidently an attempt by the State court to apply to an original assessment proceeding doctrine which the same court, in several instances Judge Gabbert himself the writer of the opinion, has repeatedly both before and since this case repudiated as unsound in violation of the 14th Amendment. These decisions, strange as it may seem, the opinion in the case at bar indicates not the least intention of qualifying or overruling.

Evans v. Denver, 26 Colo. 193.

Ahern v. Board, (Colo.) 89 Pac. 963.
D. & R. G. v. Outcalt, 2 Colo. App. 395.
Sweetland v. A. T. & S. F. Ry., 22 Colo. 220.
Robinson v. D. & R. G. Ry., 24 Colo. 98.
People v. Van Horn, 20 Colo. App. 215.
People v. Sours, 31 Colo. op. 390, 407, 413, 421, 428.
People v. Johnson, 34 Colo. 143.
In re Morgan, 26 Colo. 415.
Bircher v. People, (decided Dec. 2, 1907, not yet reported).

In the railroad cases, *supra*, it was held that any attempt by the legislature to deprive its creature the corporations of the statutory (2 Mills' Colo. Statutes, § 4184, adopting the statute and common law of England) defense of contributory negligence by "stock-killing" statutes was beyond legislative power and in violation of due process of law; in the Evans case, *supra*, that the city could not be vested with power by an act of the legislature to re-assess for local improvements where the original assessment was without the statutory prerequisite of a majority petition and so in violation of statute; in the Ahern case, *supra*, that the lack of the legislative requirement of a majority petition could not be cured; in the Van Horn case, *supra*, that the legislature was powerless to vest administrative or legislative officers with power to make any conclusive finding, even after hearings, on a question of fact; in the Sours case, *supra*, that the people of Colorado are restricted in amending the State Constitution by the mode

therein specified for its amendment, which mode cannot be cured by a vote of the people of the whole State; in the Johnson case, *supra*, that it was beyond the power of the people of the State by valid constitutional amendment applicable only to the City and County of Denver to create two county officers where but one officer in each county was authorized by other unrepealed provisions of the same constitution; in the Morgan case, *supra*, and the Burcher case, *supra*, that statutes prohibiting and providing for the punishment of those insisting on women working in laundries and miners in underground mines in excess of 8 hours per day did not amount to a legislative declaration that such work was dangerous to health or the general welfare.

I do not, necessarily, question the correctness of the doctrine of any of the foregoing cases. What I complain of in this particular connection is a failure by the State court to afford us what might be termed "an equal protection of the law" by applying the same principle to this case to which it is I think certainly equally if not more applicable.

It may be pertinently asked here, where has the legislature itself attempted in this act to dispense with either a majority petition of adversary property owners, or the requirement that the finding by the council of the existence of this essential fact shall only be "after notice duly given?" Or with any other of the jurisdictional charter requirements.

It is the subordinate city council, and the State Supreme Court performing legislative functions, that have apparently attempted to do so.

It is not, by the necessaay results and expressed

reasoning of the learned State court, a question of the power of the legislature by a subsequent statute to cure a defective exercise of power under a prior one. This is not a re-assessment. Strictly speaking, a re-assessment does not cure an original assessment. It makes a new one. It is not a cure of a defective exercise of power, because no power existed to act at all until a petition was duly subscribed and presented by the owners of a majority of the frontage for the particular paving ordered. The attempted cure, not being in compliance with the only authority granted, was as void and needing of cure as the original wrongful act. The cure attempted to be supplied was judicial legislation, pure and simple. There is but a single statutory proceeding here—(not two statutes or proceedings). The sole authority for the taking of each step authorized by this statute is, and has been repeatedly held by the State court to be, dependent upon jurisdiction to take, and the strict and regular taking of each prior step. The enactment of an ordinance is but one step of the several steps essential to be regularly taken; and that step can only be taken after, and not before the essential petition is presented. The statute mandatorily declares, "No paving shall be ordered" unless the first essential required step is taken by independent entities, a majority of the property owners. The power is not, and is conceded not to be, a discretionary power, so far as concerns the city. Therefore, in the absence of the condition to power, no power exists.

Becker v. Cuerin, and cases, *supra*.

Rhodes v. Board, *supra*.

Allen v. City, 35 Oreg. 420, 428.
Matter of Church, 66 N. Y. 395, 400.
Jex v. Mayor, 103 N. Y. 536.
Ry. v. Galvin, 85 Fed. 811, 813.
Limbeck v. City, 30 N. J. Eq. 554, 556.

As both the opinion and charter §§ 2 and 3 say, its action "can be enjoined," because of lack of a fact or facts essential to the existence of any power to act at all. Purely discretionary action can never be enjoined.

Tebbitts v. People, 31 Colo. 461.

"A mere confirmation of the original assessment—(had there been any attempt to confirm it),—confirms it with all its infirmities."

Limbeck v. City, and cases *supra*.
Evans v. Denver, and cases on p.——, *supra*.

At the bottom of page 108 the opinion says:

"The board of public works, it is true, would be without jurisdiction to take the preliminary steps in the absence of such petition, and no doubt, in such case, up to the time when the city council acts upon their recommendation as to the creating of a paving district and determines that the necessary petition subscribed by the owners has been presented to the board of public works, the latter could be enjoined from presenting any recommendation to the city council."

The board of public works is an integral part or agency of the city.

In re Senate Bill, 12 Colo. 188.

It needs no argument,—certainly not before this court,—to establish that a mere failure to enjoin a void proceeding, i. e., a proceeding taken as the State court, in so many words, concedes that of the city acting through its agent, the board of public works, in this case to have been taken without jurisdiction, cannot itself confer jurisdiction on anybody.

Zeigler v. Hopkins, 117 U. S. 683.

Ogden v. Armstrong, 12 Utah, 476; s. c. 168 U. S. 224.

Meyer v. Berlandi, 39 Minn, 438, is exactly in point. In that case the court held a mechanics' lien act declaring "that the fact that the person performing the labor or furnishing the material was not enjoined from performing the labor or furnishing the material by the person in whom the title was vested, shall be conclusive evidence that such labor was performed or material furnished with and by the owner's consent," unconstitutional, saying:

> "The bare statement of such a proposition is sufficient. A man cannot be thus deprived of his property without his consent. The legislature may doubtless establish rules of evidence, but to enact a law making conclusive evidence that which is not so necessarily in and of itself, and thus preclude a party from showing the truth, would be nothing short of confiscation of property, and a destruction of vested rights, without due process of law."

The very recent case of O'Connor v. Carpenter, 107 N. W. 913, is quite in point. I quote from the syllabus:

> "Act No. 128 provides that every person served with a notice specified by § 140 who shall refuse or neglect to pay or tender to the purchaser of land for taxes the sum provided for in the act within the time limited, and who shall have neglected within 6 months to commence suit to set aside the tax deed, shall thereafter be barred from questioning the validity of the tax title or tax deed mentioned therein. Held that such act was an attempt to compel one in possession of property to resort to a court to restrain another from an unwarranted claim and was therefore unconstitutional as a deprivation of property without due process of law."

See, also, Cooley Const. Lim. (7th Ed.) pp. 522-3.

I quote a portion of the syllabus in the well known case of Grozbeck v. Seeley, 13 Mich. 329, in which it was held that even an express statute in a case where the prior proceedings were invalid could not compel resort to the courts by a party like the plaintiffs in the case at bar, in possession:

> "The statute, so far as it declares lands bid off by the State, and not disposed of for 5 years, shall vest in the State an absolute title in fee simple, is not a statute of limitations, and is void as a taking of private property without due process of law. One who is in the actual or constructive possession of property is under no

obligation, nor can he be compelled to take measures against an opposing claimant; and a law depriving him of the right of property in such a case is in no sense a limitation law, but an unlawful confiscation."

In the well reasoned case of Baker v. Kelly, 11 Minn. 480 (11 Gill. 358), concerning a statute declaring "that any person having or claiming any right in or to any land, after a sale adverse to the title or claim of the purchaser at any such tax sale, shall, within the year from the time of the recording of the tax deed for such premises, commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises," the court, on page 373, says:

> "A law requiring a party (in possession) to take such action is not, nor has it any analogy to a statute of limitations. Statutes of limitations only operate as an extinguishment of a remedy, and, of course, can have no application to a party who neither seeks nor needs a remedy, but a party who has enjoyment of his rights cannot be compelled to take measures against an adverse claimant, and a law taking away the rights of a party in such cases is an unlawful confiscation, and in no sense a limitation law. Due process of law, without which the constitution declares a person shall not be deprived of life, liberty or property, is not merely an act of the legislature * * *. To say, as has been suggested, that the law of the land, or due process of law, may mean the very act of the legislature which deprives the citizen of his right,

> privileges or property, leads to a simple absurdity * * *. There is no difference in principle between requiring a party to bring a suit, pay a sum of money, or do any other act as a condition to a status in court, or the enjoyment of his property. That justice is not free or without purchase within either the spirit or the letter of the constitution, which can only be obtained on either condition."

The same reasoning was adopted in Barber Co. v. Ridge, 169 Mo. 376, in considering the charter provision that the owner shall within 60 days from the issue of the tax bills file with the works board a written statement of all objections which he may have to their validity * * * and in any suit on any tax bill no objection not so included shall be urged, by him in defense. By the act no lien attaches to the property until after judgment establishing the validity of the tax bills. In declaring the section in relation of due process of law, the court, on page 384, said:

> "No law can compel one who has possession under claim of right, to take legal steps against an outstanding or opposing claim."

The foregoing cases have never been doubted or questioned, and the clearly expressed and logical doctrine therein announced, has been followed in Colorado, not once merely, but repeatedly. It is in fact confirmatory of the time honored maxim, "Possession is nine points of the law."

It is worthy of note that no lien is cast upon property later to be attempted to be assessed for

local improvements by any of the initiary charter proceedings. The creating ordinance creates no lien or cloud. By provision of the charter it is not until the property is assessed that any lien or cloud attaches. (Charter Art. 7, §§ 32 and 34 to 36), said § 32 provides that "All assessments made in pursuance of this article shall be a lien in the several amounts against each lot or tract of land, and shall have priority over all other liens excepting general taxes," and by 3 Mills' Colo. Statutes, § 1752a, it is provided that:

> "In all actions in all courts of record and before justices of the peace, the original assessment, or a certified copy thereof, purporting to be made by the corporate authorities of any municipality in this State, under a statute authorizing the same, which determines the cost and expense due for or on account of the construction of any kind of local improvement in the taxing district wherein such property shall be located, or in front of, abutting upon or adjacent to said realty, within any such municipality, whether the same be organized and existing under special charter or under general incorporation law, shall be and the same is hereby declared to be and shall be so accepted and treated by such tribunals as *prima facie* evidence of the lawful existence, and due and proper performance of all preliminary steps essential and requisite to make such assessment a legal and valid assessment against the said realty or owner thereof, or both, against whom it appears to be made." (Laws/891, p. 192.)

The case of Morris v. Bank, 17 Okl. 232, is in point to the effect that a party cannot be put in default by failure to act until after a lien attaches. The bank brought suit against Morris to quiet title. Morris claimed title under a tax deed and pleaded the 5 year limitation statute. The court on page 241 said:

> "When defendants acquired a *prima facie* title to the land by putting the deed upon record, the plaintiff's title was clouded; then, for the first time, plaintiffs' present cause of action accrued, and it might thereupon bring its action to determine the validity of such deed."

In City v. Smiley, 62 Kas. 718, the court declared:

> "Where a city is proceeding to construct a sewer, and having declared such improvement necessary, has let a contract for the work, but has not apportioned the cost of the same, or caused any tax to be assessed against the lots within the sewer district, an action by the owner of real estate in such district to enjoin the city from levying against his property assessments or taxes for the cost of such improvements, is prematurely commenced and cannot be maintained."

See, also,

Mason v. City, 61 Kas. 188, op. 190.

Holmquist v. Anderson, 67 Kas. 861.

Batty v. City, 63 Neb. 26; s. c. 88 N. W., op. 140.

Even express statutes permitting parties in possession to bring actions to quiet title, authorize actions which but for the statute could not be maintained where the asserted adverse claim is invalid, (i. e., does not create a cloud), and are a recognition of the doctrine in the cases above stated. It is to be noted that all such statutes are permissive merely, declaring that parties in possession "may" bring suit against adverse claimants, etc., and in Quinn v. Kellogg, 4 Colo. App. 158, op. 164, it was expressly held:

> "We have no statute which limits the time within which a party in possession shall proceed to remove a cloud from his title, and as no lapse of time can restore validity to a mortgage which has been paid and extinguished, so no lapse of time will bar a mortgager from proceeding to cause the fact of its extinguishment to appear upon the record."

No lien or cloud is created by the works board preliminary procedure or even by the ordering ordinance, whether same be valid or invalid. The first lien or cloud in any local improvement proceeding is the "assessment." As said in the Morris case, *supra*, it is the attaching of a lien or cloud which first constitutes a cause of action. If as that and the above cited cases say, property owners like plaintiffs in possession cannot be in default from failure to take affirmative action against valid preliminary proceedings because they do not create a lien or cloud, they certainly cannot be by failure to enjoin or act against invalid proceedings creating no lien or cloud.

Steinmuller v. City, 3 Kas. App. 45, op. 50.
Housman v. Kent, 58 Mich. 364.
Miller v. Otis, 74 Ill. 384, op. 390.
In re Hearn, 96 N. Y. 378.
Dederer v. Voorhies, 81 N. Y. 153.
Moore v. Brown, 11 Howard, 414.
Armstrong v. Ogden, 12 Utah, op. 495-6; s. c. 168 U. S. 224.

As before stated, the provision of § 32, is "that all assessments made in pursuance of this article" shall be a lien, etc. This certainly does not mean all attempts at assessment made in disregard of this article shall be liens.

Batty v. City, 63 Neb. 26; s. c., 88 N. W., op. 140.
Mitchell v. Titus, 33 Colo. 386.
Brown v. City, 7 Colo. op. 305.
Gomer v. Chaffee, 6 Colo. 314.
Rittmaster v. Richter, 14 Colo. App. 361.
Baker v. Cuerin, 15 Colo. 281.

In Security Company v. Wolfe, 27 Colo. 218, op. 222, a tax title case where the plaintiff holder of the tax deed introduced it in evidence over objection and rested, Judge Gabbert, in recognition of this doctrine, for the court, said:

"The law relative to special assessments for sewer taxes provides that certain (preliminary) steps must be taken in order to render such tax legal. But as the law also declares that a tax deed shall be *prima facie* evidence that the

taxes for which the property was sold were levied according to law,"

it was proper to receive the tax deed regular on its face in evidence without the preliminary proof that would at common law be required. The burden was then on defendant to show it was irregular.

As the case of Keeze v. City, 10 Colo. 112, op. 122, and thousands of other assessment cases which might be cited, with uniformity say:

> "The objection (failure to comply with jurisdictional statutory charter prerequisites) goes to the origin of the proceeding and is jurisdictional. The principles of estoppel can have no application in such a case."

See, also—

Ahearn v. Board, (Colo.) 89 Pac. 963.

In order to work an estoppel, "the party estopped must have actively intervened to secure the passage of the act or to get the work done." He must also have misled and actively induced the other party who must be ignorant of the truth, to act to his injury.

Our own Supreme court has laid the doctrine down as to the essential elements of estoppel too many times to justify one going out of our own State for citations. They were thus stated by Griffin v. Wright, 6 Colo. 248:

> "The essential elements of estoppel by conduct are (a) there must have been a representation or concealment of material facts, (b) the representation must have been made with

knowledge of the facts, unless the party making them was bound to know the facts or ignorance thereof was the result of gross negligence, (c) the party to whom the representations were made must have been ignorant of the truth of the matters, (d) they must have been made with the intent that they should act upon them; but gross and culpable negligence upon the part of the party sought to be estopped, the effect of which is to work a fraud on the party setting up the estoppel, supplies the place of intent, (e) and the other party must have been induced to act upon them. All these essential elements must be present."

See, also—

City v. Coronado M. Co., 37 Colo., op. 246-8.

In the recent case of Dimpfel v. Beam, (Colo). 91 Pac. 1107, which was a tax deed suit to quiet title, the court quoting from the early case of Gomer v. Chaffee, *supra*, said:

> "It is difficult to see how the statute of limitations can avail a defendant holding under a void deed. There was nothing for the statute to operate upon; nothing for it to run in favor of or against; nothing to set it in motion. The deed was void; it did not give him constructive possession, nor the right of actual possession."

The same is true here. There was no majority petition of the property owners which is conceded in the opinion to be jurisdictional to the power of the

city through its works board or other agency to act at all, so their resolution recommending the form of bill for a creating ordinance was void. Such a resolution of the city through its works board being conceded to be jurisdictional to the power of the city through its council or other agency to act at all, and that resolution being here conceded to be void, "there was nothing to set the city (through its council, or other agency) in motion;" nothing for it to act on, either in favor or against.

In the tax deed case of Keller v. Hawk (Okl.), 91 Pac. 778, the Oklahoma court very recently said:

> "The authority to issue the deed cannot be exercised to overthrow by false recitals in a deed the records upon which it is based."

The case of Roberts v. Roberts, 3 Colo. App. 6, involved the question of the validity of a divorce decree based on service by publication. The court said:

> "The right to give notice by publication, being of statutory origin, the provisions of the statute as to the length of time during which the notice is to be published must, of course, be complied with, in order for jurisdiction to attach. A failure to publish the notice for the requisite length of time (or other defect whatsoever in the notice) is not a mere irregularity, but is a jurisdictional defect and will render subsequent proceedings under such notice void."

Further on the court, after stating that the affidavit for publication "did not state that a copy of

the summons was deposited in the postoffice'' as required by statute, says:

> "There was an idle attempt apparently to obviate this difficulty by the introduction of oral testimony tending to show that the defendant had knowledge of the pendency of the suit."

Regarding this the court says:

> "In what way it was conceived that the difficulty could be cured by that sort of proof offered at that time, it is not easy to determine. It is certain that the evidence was useless for the purpose, and the court could not render valid a judgment which must rest upon an exact and strict compliance with the statute."

See also Davis v. Co., 2 Colo. App. 381, op. 387.

O'Rear v. Lazarus, 8 Colo. 608.

Bannon v. Burnes, 39 Fed. 895.

Marsh v. County, 10 Wall. 683-4.

In the case of Becket v. Cuenin, 15 Colo. 281, op. 284, the court said:

> "It is an established principle in all courts that the method of acquiring jurisdiction by publication, is in derogation of the common law, and that the statutory requirements must be successively and accurately taken to confer upon the court jurisdiction. * * * This principle has been so often decided and so universally declared, it is wholly unnecessary to cite authorities in support of the proposition."

In construing these same 1893 charter sections the court in Rhodes v. Board, 10 Colo. App. 99, op. 105 *et seq.*, said:

> "In the matter of providing for improvements upon streets, the board of public works moves itself or is moved from the outside. All improvements excepting paving are initiated by the board. But in the matter of paving it is powerless until a legal petition for the purpose has been presented. * * * The proposal comes in the form of a petition signed and presented by those upon whom the burden of the assessment for the work will fall; and the presentation of the petition is the very first step to be taken. It is an indispensable prerequisite condition to any action in the premises by the board. When it comes, and the board is thereby advised of the limits and location of the improvements, it can determine the district of lands to be assessed for the work and adopt necessary specifications. The engineer, being informed of the work to be done, and the character of the materials to be used, is in possession of the data necessary to an estimate of the total and distributive cost. It is evident to us that the duties required by the first and second subdivision are simply preliminary to the order provided for by the third. And that they follow and must, in the nature of things, follow the presentation of the petition.

Continuing on page 113 the learned court says:

> "By the provisions of the Denver charter,

where the cost is to be paid by the abutting owners, no paving can be ordered unless a majority petition for the purpose by them is first presented. The petition designates the particular material desired for wearing surface, and if the paving is done, that material must be used. This is the controlling feature of the charter provision on the subject. The board cannot dictate the material. It is determined upon by the owners. If material, unfit for paving purposes or detrimental to the public interests, should be proposed, the board, having in charge the interests of the public, might reject the proposal; but with the authority to pass upon the question whether the material proposed could properly be used for paving, its discretion ends. The subsequent steps it is required to take are simply means provided for carrying into effect the will of the petitioners. Its first duty after receiving the petition is to adopt details and specifications for the pavements, and in these specifications the particular kind of material mentioned in the petition must be so described by standard and quality as to admit of genuine competition between contractors. * * * All other preliminary duties having been performed, the resolution ordering the pavement would be adopted, and an ordinance authorizing the improvement prepared and submitted to the city council. Upon the passage of the ordinance, bids would be invited for the work."

Another valuable case involving several of these provisions of this same charter is that of Dumars v.

City, 16 Colo. App. 375. On page 392 the learned court says:

> "If the notice required by section 3 of article 7 was not published for twenty days in two daily newspapers of general circulation, published in the city of Denver, the board of public works was without jurisdiction or power to move further, and all subsequent proceedings were void. * * * The requirements concerning the notice are jurisdictional. It must be given by the board of public works, it must contain ALL the matters specified in the section providing for it, and it must be published for the requisite length of time. In the matter of authorizing and constructing public improvements by a municipality, the mode provided by charter must be strictly pursued, and ANY departure from the formula prescribed vitiates ALL proceedings under it. Merritt v Portchester, 71 N. Y. 309; Keeze v. City of Denver, 10 Colo. 112; Tifft v. City of Buffalo, 49 N. Y. Supp. 489; Carlisle v. Clinton Co., 140 Ill. 512; Moore v. Mayor, 73 N. Y. 228; Ogden v. Armstrong, 168 U. S. 224; Hawley v. City of Fort Dodge, 103 Iowa, 573."

I quote, as very applicable here, from the syllabus in the late case of Ahern v. Board (Colo.); s. c., 89 Pac. 963 decided April 1, 1907:

> "Laws 1901, p. 199, c. 87, § 2, provides that, in the organization of an irrigation district, a petition signed by certain persons shall be filed with the board of county commissioners, and that the petition shall be published for at

least two weeks before the time at which the same is to be presented to the board, together with a notice stating the time of the meeting at which the same shall be presented. Publication was made as follows: 'To the Board of County Commissioners: * * * We, the undersigned, will present to your honorable body * * * a petition, * * * which * * * petition shall particularly set out the following, to-wit:' Immediately below in the newspaper was a copy of the petition, with the signatures of the petitioners. *Held*, that the notice was insufficient; the signatures to the petition not being signatures to the notice also.

"Laws 1901, p. 198, c. 87, providing for the organization and government of irrigation districts, should be given a reasonable construction, bearing in mind that a statute imposing a special burden, as it does, is strictly construed, and in case of doubt in favor of the taxpayer, notwithstanding its provisions that every material statement of the petition, filed in special proceedings by the board of directors of an irrigation district to have the validity of its organization and bond issue determined, not specifically controverted by the answer, shall, for the purpose of the special proceedings, be taken as true, and that the court, in inquiring into the regularity, legality, or correctness of the proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties."

I know of no more accurate statement of the

doctrine applicable to this case than that by Judge Cooley in 2 Cooley on Taxation (3rd. Ed.), p. 1243 as follows:

> "Municipalities, having no inherent power in these cases, it is necessary to the validity of their action that they keep closely to the authority conferred. (Citing cases.) Their ordinances and resolutions must be adopted in due form of law and they must keep within them afterwards. They can bind the taxpayer only in the mode prescribed, and can constitute no other. (Citing cases.) Their legislative action, if properly taken, is conclusive of the propriety of the proposed improvement and of the benefit that may result, if it covers that subject, but it will not conclude as to the preliminary conditions to any action at all; such, for example, as that there shall be in fact such a street as they undertake to provide for in the improvement of, or that the particular improvement shall be petitioned for or assented to by a majority or some other definite proportion of the parties interested. This last provision is justly regarded of very great importance, and a failure to observe it will be fatal at any stage of the proceedings. And any decision or certificate of the proper authorities, that the requisite application or consent had been made, would not be conclusive but might be disproved."

As he later aptly puts it:

> "The jurisdictional fact must exist before any irregularities can occur, and all subsequent

> acts of the officers are mere nullities, and it will not be urged that the legislature can transform nullities into valid acts, or create something out of nothing."

The same idea was well expressed in the recent assessment case of Zalesky v. City, 118 Iowa, 714, op. 723, where it was said by the court:

> "Defects which may 'be cured' are such only as inhere to the time and manner of the proceeding, the machinery of the law having once been properly put in motion."

In other words, jurisdictional questions are always open to inquiry.

The express concession and holding in the last quoted extract from the opinion in the case at bar, is, I submit with all due deference, fatal to the learned court's logic, and the extraordinary conclusion arrived at in the case at bar. It contradicts itself. It says, the board of public works, acting on behalf of and as a part of the City (to whom alone whatever power exists was granted) "could be enjoined from presenting any recommendation to the city council" (another part of the same corporate entity), because the grantee of the power (the city) would be "without jurisdiction to take the preliminary steps" in the absence of a majority petition by adversary property owners. It further concedes, what is expressly stated in charter § 2, the council, on the city's behalf, can only order the paving by an ordinance after recommendation of the works board, which ordinance, if adopted, "shall be in the form recommended by the board of public works by

endorsement thereon, and shall not be subject to amendment by the city council." It necessarily follows that in the absence of a recommendation, "by endorsement thereon," by the board of public works of a valid "bill for an ordinance," the city, acting through its council, the part, as well as the whole, would be equally without jurisdiction to order the paving by ordinance or act at all, and the whole city, as well as each of its parts, could be enjoined from ordering the paving or acting at all in the premises.

How can the part (on behalf of the whole) possess any greater power than the whole possesses?

The point I am attempting to make clear, is, it is necessarily (as well as expressly) conceded by the opinion that the power of the city to order paving on the district assessment plan is not solely or at all a mere discretionary power existing in the city. It is a single conditional power existing only after the conditions prescribed exist.

No one can question that unrestricted power and restricted power to pave cannot exist as a single power in the same entity in the same proceeding under the same statute. They are antagonistic, separate powers and cannot co-exist as a single power.

The power granted was a single power, not two separate powers. It was a power to pave. It was a power granted to the city as a whole. It was either restricted or unrestricted. It was either a power to pave conditional on majority petition first presented and certain preliminary action taken, or a power to pave without any petition or preliminary action whatever.

The court in the case at bar says, and the legis-

lature also said, it is a conditional and not an unconditional power.

No one will question that the legislature had the power to require the obtaining by the city from the property owners of just such a petition as was in fact required by the 1893 city charter as a condition to and before permitting it to acquire jurisdiction to act at all in ordering paving on the district assessment plan. In other words, to interpose a question of pure fact as a condition precedent to the existence of any power on the subject in that limb of the city known as the council to act at all.

Cooley Taxation (3rd Ed.), pp. 1243-1251, and cases cited in notes.

McGehee Due Process of Law, pp. 235-239; 246-252.

Christy v. City, 13 Okla. 585.

Benson v. People, 10 Colo. App. 175, op. 179-180.

Scott v. City, 36 Fed. 385.

Mulligan v. Smith, 59 Cal. 206, op. 227-229, 234-235, 239, affirmed in

Zeigler v. Hopkins, 117 U. S. 683.

Ogden v. Armstrong, 12 Utah, 476; s. c. 168 U. S. 224.

This is just what the legislature in fact did. It imperatively declared "no paving shall be ordered unless a petition for the same is first presented subscribed by the owners of a majority of the frontage to be assessed for the same." The existence or nonexistence of the required petition is a question of pure fact. The determination of any question of

fact is a question which can, under the provisions of the 14th Amendment, be decided only after first giving notice and affording the right and opportunity for the adversary to be heard. This is true also under the repeated decisions of the State.

It is, as necessarily must be all questions of pure and not merely discretionary fact, at least a *quasi*-judicial if not a judicial question, to be conclusively determined only after notice and regular adversary proceedings.

For the legislature in the charter to have in so many words expressly said that the determination of this question of pure fact, itself involving no elements of discretion in the city, should be conclusively made only after notice, right and opportunity for hearings before the body vested with power to decide it, or that it should be made only by a competent tribunal, would have added nothing. The express inclusion of such language would have been pure surplusage so far as the question of constitutional power under the 14th Amendment is concerned.

Such a question of pure fact unadulterated, can be determined only after notice and opportunity to defend before the body making the conclusive finding.

Mulligan v. Smith, *supra*, 59 Cal. op. 230-233, 237, 238, 240, 242, affirmed in

Ziegler v. Hopkins, 117 U. S. 683, op. 687-688.

Davidson v. City, 96 U. S. 97, op. 102, 107.

Hurtado v. California, 110 U. S. 536.

Hager v. District, 111 U. S. 701.

Lent v. Tillson, 140 U. S. 316.

Ogden v. Armstrong, 168 U. S. 224.
Yick Wo v. Hopkins, 118 U. S. 356.
Monongahela Co. v. U. S. 148 U. S. 327.
Hovey v. Elliott, 167 U. S. 409.
Koller v. Holly, 176 U. S. 398.
School v. McAnnulty, 187 U. S. 94, 107.
Norwood v. Baker, 172 U. S. 269.
Simon v. Craft, 182 U. S. 427.

"Due process of law implies the right of the person affected to be present before the tribunal which pronounces judgment upon the question of life, liberty or property in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Ziegler v. Co., 58 Ala. 594, op. 597, cited and approved in
Denver v. Outcalt, 2 Colo. App. 395 op. 402-405.
C. & M. Ry. v. Minn., 134 U. S. 418, op. 457.
City v. Towle, 48 N. H. 57, op. 61.
Meyers v. Shield, 61 Fed. 713, op. 717.
McGavock v. City, 40 Neb., op. 75-77.
Steuart v. Palmer, 74 N. Y. 183 op. 191-195.
Violette v. City, 92 Va. 561.

City v. Young, 97 Va. 728.
Barber Co. v. Ridge, 169 Mo. 376.

"Any statute" aptly said our Court of Appeals in the Outcalt case "that forecloses a defendant and precludes all defense and denies the day in court, is, and must be, unconstitutional and void."

Either all of the material preliminary procedure required by the legislature for the protection of the property owners is necessary before a valid ordinance ordering paving can lawfully or at all be enacted by the council OR none of that carefully outlined preliminary procedure is at all required to be performed, happen or exist.

As applicable here I quote from the decision of this court in French v. Edwards, 13 Wall. 506:

> "There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed merely to secure order, system and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrafice of his property, and by a disregard of which his rights

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might be and generally would be injuriously affected, they are not directory, but mandatory. They must be followed, or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise."

See, also, Lyon v. Alley, 130 U. S. 177.

The charter expressly declares that all of the expressly required material conditions precedent prescribed for the protection of adversary property owners shall regularly exist, before any paving can be ordered by the city acting through its council or otherwise.

As the learned court concedes the power is a conditional and not a discretionary power, another fallacy in Judge Gabbert's reasoning and the conclusion reached in this case, is disclosed from the fact that there is no provision whatever in the charter authorizing any conclusive finding or recital covering any of the other matters declared essential, being the entire § 2 and the entire provisos "First," "Second" and "Fifth" and other parts of proviso "Third" of charter article 7, or concluding as to a lack of benefits.

If it were such recital merely, the council would have the power to make that recital by ordinance regardless of whether or not there had been the required or any petition whatever by adversary property owners, or any preliminary procedure, or recommendation whatever by the works board or anybody else. If the action were merely legislative, no power on earth other than their consciences (if they chanced

to have any) could prevent the city through the council from making the recital.

But the court concedes this is not the power granted. It concedes the power granted is a conditional and not a discretionary power. It concedes it is a power which "can be enjoined."

This much being settled, then what is it that clothes the city with jurisdiction to act?

Clearly and unquestionably, compliance with the statute, from which alone, it derives its only authority to act at all. It cannot possibly be anything else.

The State Supreme Court concedes, and necessarily so, in this case, that authority, as the legislature granted it, was not fully complied with. That it was scarcely, even in part, complied with. The way the court evades making all these express fact-concessions in so many words, (which would make its opinion ridiculous), is by ignoring them.

As I said in opening, the State Supreme Court does not dispute or in any manner question or reverse any of the fact-findings of the trial judge. Where the opinion does not expressly in so many words concede the facts to be as the trial court found them to be, it says nothing but disregards them as immaterial. It nowhere disputes their accuracy as facts. It, in effect, says that notwithstanding each and all of the facts were as the trial court found them to be, he was precluded by the action of the city authorities (as he found it to be) from inquiring into them. It reverses the trial court's finding as to the law and not as to the facts. It reverses the case with directions for judgment. The State Supreme Court in effect says that it is immaterial what the

plaintiffs alleged and proved, they should not have been permitted to prove anything in this case.

As quite appropo in this connection, I quote from the unanimous opinion of this court, speaking through Mr. Justice White, in Hovey v. Elliott, 167 U. S. 409, op. 417:

> "Can it be doubted that due process of law signifies a right to be heard in ones defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to the law and to enfore justice courts possess the right to inflict the very wrongs which they were created to prevent."

(H) There was no ordinance finding. There were none of the three equally-essential ordinance *findings* as authorized by said proviso "Eighth." Said proviso, *as the legislature* enacted it, reads:

"And the finding of the city council by ordi-

nance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid shall be conclusive in every court or other tribunal."

There was no finding, or recital of an alleged finding even, in any (valid or void) ordinance, either (1) that the improvements were duly ordered after notice duly given; or (2) that A petition or remonstrance was or was not filed as above provided; or (3) or was or was not subscribed by the required number of owners aforesaid.

Nor was there any recital of the equivalent of any one or more of said three essential *findings* authorized.

The only *recital of any claimed finding* (there was no real "finding"),—actually contained in the so-called creating ordinance was as follows:

> "That upon consideration of the premises, the city council doth find that in their action and proceedings in relation to said 8th Avenue Paving District No. 1, the said *board of public works* has fully complied with the requirements of the city charter relating thereto." (Record, p. 12.)

The recital of claimed finding actually contained in the alleged assessing ordinance (if that *make-believe* ordinance, *resting on nothing*, be considered) adds *nil*. It reads as follows:

> "That upon consideration of the premises

the city council doth find that said improvements were duly ordered (nothing whatever being said about any petition or '*after notice duly given*') and that in *their* action and proceedings in reference to said improvements, said (works) *board* has fully complied with the charter and ordinances of said City relating thereto." (P. 18.)

Just why they say "ordinances" (plural) instead of ordinance (singular) must remain, like all the make-believe *findings* and the alleged *assessment*, to be supplied by pure conjecture, or *inference based on conjecture*.

In this connection let me ask, what is the meaning of the word "*conclusive*" as used in the proviso? Conclusive on *whom?* Conclusive of *what?*

Conclusive on *whom?* It is my contention it can, without additional legislation, under the courts' construction that no notice is, or is *required to be*, given or right to defend *required* to be afforded before the council, be conclusive *only* on the party (City) who makes it.

The charter does not say *conclusive of the jurisdiction of the City, or of the authority of itself or its council to act*. If the State court *adds* that additional grant of extraordinary power, it must do so by *legislation by inference* and *inference by conjecture* merely. And by *legislation by inference* equally as baseless and equally as violative of the 14th amendment as the *construction by inference* it placed upon its own *substitute* for said proviso "Eighth." But I will have more to say about conjectural *inference* and *legislation by inference* in my argument on point numbered II.

Conclusive of *what?* Certainly an actual *finding* even in fact made cannot be *conclusive of more than the mere facts found.* If more is *supplied*, without a *legislative* enactment supplying more, it must be supplied not by *law*,—not by a "*rule* of conduct," but by *judicial* conduct and *conjectural* inference *without* law. In other words, by mere *arbitrary* ungoverned *fiat.*

But, I submit, it must be conceded that the facts actually *recited to have been found* (there was no *finding* in fact,—in either or both of these ordinances),—is but a small *part* or portion of all the facts declared by the charter *essential* to exist and construed by the court as *necessary* either to exist or be found to exist before the city or either of *its* limbs or instruments (the works board and council) has any power to act at all.

The legislative intent that a recital such as made in the case at bar simply "that the *works board* has fully complied" with *its* subordinate part of the one entire procedure, cannot cover action or inaction by others entities having *independent* parts to perform, for instance *by property owners* in presenting and subscribing a majority petition, and failing to subscribe and present a majority remonstrance, clearly appears from the statutory authorization in all paving cases for additional *distinct* recitals on each of these essential facts. Neither was made in the alleged "*finding*" in the case at bar.

No petition is by the law required in other than paving cases. That is doubtless the reason the legislature provided for *separate* distinct findings. Findings that would be inapplicable and unnecessary in some cases (as for instance, *sewers)* would be absolutely

essential in other cases (as for instance *paving)*.

In paving cases the City, including its limb the works board, is incompetent to act at all until a majority petition is presented by the property owners. The acts found are acts of the *works board* only. It is by that limb of the City known as its *council*, not its works board, that it *creates* the district and orders the improvements in paving as well as all other cases. And the limb known as its council is powerless to act at all until another *independent* actor (the property owners) and the City's other limb (its works board) have both acted.

A reading of the opinion in this case and comparison of it with the "findings" *authorized* by the Charter will clearly disclose that the State Supreme Court, in the construction placed by it upon the provisions of the charter proviso "Eighth" it *substituted* for the General Assembly's charter proviso "Eighth," construed,—(to be more accurate *framed)*,—said proviso as authorizing a conclusive recital of an essential fact in no way involving *discretion* by the council, *jurisdictional* to its own power to act at all, *without any investigation had by the council, or any notice given by or opportunity afforded for hearing interested adversary property owners* before the council. Further, it construed the mere *recital that a finding had been made*, conclusive that it was a *finding* and not a recital merely. And it construed an *ambiguous* recital in a *void* ordinance of an *ambiguous* claimed finding of *ambiguous* facts from which it equally either could or could not, as desired, be inferred either that the law had or had not, as desired by the inferer, been complied with. But enough of this for

the present. I will have more to say on this power to *legislate by inference* under point V. And as so judicially *remodelled*, the State court declared it not to violate "due process of *law*" under the 14th Amendment.

There was no recital whatever in the so-called "finding" of any "notice duly given" by the council, and in view of the actual lack of any such notice or investigation as shown from the record itself in the case at bar, the State Supreme Court must have construed the proviso as deeming this wholly unnecessary to conclusively conclude the plaintiffs on that *essentially* jurisdictional question.

The so-called "finding" does not find any action whatever of *property owners*, (adversaries of and over whom the city had no control to coerce either to sign or decline to sign any petition), in subscribing or filing a majority petition, or in *not* subscribing or filing a majority remonstrance. Nor does the court (bearing in mind the record shows the first was *not* filed, and the second *was*) deem either of such findings necessary in order to *supply* these concededly jurisdictional statutory missing links in the process of *conclusively concluding* these property owners from showing the truth, *i. e.*, (1) that *no petition was* in fact so subscribed or presented, (2) that *a majority remonstrance* was so subscribed and duly presented, and (3) that the law had not been, either fully or at all, in all respects complied with.

The so-called "finding" does not recite that a petition was subscribed by the owners of a majority of the frontage to be assessed Nor does the court construe said proviso as *not* requiring any finding of this concededly essential missing link in the statutory

procedure, in order to *conclusively conclude* plaintiffs from showing the lack of any right or power in the City to act at all. The court *supplies* this concededly *essential* finding by substituting its own proviso "Eighth" for that of the General Assembly, and then supplying necessary facts by *ambiguous* conjectural *inference*.

The plaintiff showed an entire lack of jurisdiction and that the so-called "finding" claimed to have been made was not a "*finding*" at all, but a *recital of an alleged finding in a void ordinance* merely.

There must certainly be a finding in fact. Each of the separate facts authorized to be found must be found (if they do not in fact exist) in order to render the assessment regular, and place the procedure beyond collateral attack because of the actual lack of those essential facts. The procedure is not even *prima facie* regular until after an "assessment purporting to be made by the corporate authorities."

Even a recital of a claimed finding of totally immaterial facts, not authorized to be found, cannot be sufficient to fortify the so-called assessment against attack because of lack of other essential facts necessary to exist, not authorized to be conclusively found, and not existing.

The plaintiffs, among other things, contended that said proviso "Eighth," on its face, does not, was not intended to, and, without a violation of the 14th amendment, could not cover or affect (even as to the fact or facts claimed to have been found) adversary property owners who were not afforded any right and opportunity to defend before the body making the alleged conclusive finding on a question

of fact in no wise involving discretion. It may be such a recital of claimed finding would be binding on the city who made the recital—but certainly not on adversaries.

The construction given by the State Supreme Court makes the recital of a claimed finding conclusive on adversarites without opportunity to defend that the recital was itself a valid finding. Plaintiffs showed what the opinion in the case at bar, in effect, says they had no right to show, there was no finding at all but merely a recital in a valid ordinance. It thus precludes our showing any of the facts mentioned in the first subdivision of this brief.

What is the meaning of the word finding? All the first class dictionaries define the words "find" and "finding," when used in a legal sense, "to determine (or determining) after judicial or *quasi*-judicial inquiry."

Webster's dictionary defines "finding" in law as: "The result of a judicial examination or inquiry, especially into some matter of fact; a verdict; as a finding of a jury" referring to Burrill.

Funk and Waynalls Co.'s Standard Dictionary as: "The conclusion as to matters of fact arrived at through testimony heard before an official or court; as the finding of a jury; the finding of a commissioner or referee."

3 Century Dictionary: *find:* "In law to determine after judicial inquiry."

Bouvier defines "finding" as: "The result of the deliberations of jury or a court."

Anderson: "The decision of a judge, arbitrator, jury or referee."

Black: "A decision upon a question of fact

reached as the result of a judicial examination or investigation by a court, jury, referee, coroner, etc."

Rahalje & Lawrence: "A finding is a conclusion upon an inquiry of fact."

By its charter,—the only authority it possessed,—the city can only order paving or other improvements through its limb (council) by ordinance. Before doing so, the charter says the council must find the authorized facts,—not merely as the State court says recite it has found other facts from which it can (?) be INFERRED it has found or failed to find the only facts authorized to be found.

The opinion in the case at bar construes the proviso as precluding any showing whatever of any fact or facts whatever which, if shown, would render the alleged finding void.

This construction makes the mere attempt to do a thing conclusive of its own validity. It makes the assertions of the right to do conclusive of the right to do. I submit this is clearly beyond the power of the legislature.

Marx v. Henthorne, 148 U. S. 172.
Bennett v. Davis, 90 Me. 102; op. 106.
Gilman v. Tucker, 128 N. Y. 190.
Harris v. Sterns, 17 S. D. 439.
Parish v. County, 133 N. C. 478.
Beebee v. Magoun, 122 Iowa, 94.
Dawson v. Peter, 119 Mich. 274.

It precludes our showing that the alleged ordinance containing the supposed recital was not an ordinance, in fact, but a void unauthorized act. From showing it was a void ordinance.

Bank v. Granada, 44 Fed. 262.
Tracy v. People, 6 Colo. 151.
Cordilla v. City, 34 Colo. 293.

From showing that anything and everything declared by the charter essential to exist, failed to exist. The opinion says, in substance, whatever was essential to exist could be supplied by pure conjecture that it did exist.

Hays v. City, 71 N. Y. 495.
Dougherty v. Hope, 3 Denio (N. Y.), op. 599.
McDaniel v. Correll, 19 Ill. 226.
Ry. v. Galvin, 85 Fed. 811,813.
City v. Brinkwater (Mo.), 102 S. W. 1091, op. 1098.
Malone v. Williams (Tenn.), 102 S. W., op. 808.

It precludes our showing the property was damaged instead of benefited by this asphalt pavement in a suburban residence district. It precludes us from showing our property was confiscated.

Knowles v. City, 17 Colo 204.
City v. Kennedy, 33 Colo. 82, 93.
City v. Campbell, 33 Colo. 162.
White v. Tacoma, 109 Fed. 32.
Iowa Co. v. Callanan, 125 Iowa, 358.
City v. Bitter, 115 Ky. 363.
City v. Havelin, 96 Ga. 382.
Cain v. City, 42 Neb., op. 122.

Allen v. Drew, 44 Vt., op. 188.
Norwood v. Baker, 172 U. S. 269.

It precludes our showing the purpose of the ordering was a private graft instead of a public purpose.

Platte Canal v. Lee, 2 Colo. App. 184.
City v. Jackson (Colo.), 92 Pac. 690.
Loan Co. v. Topeka, 20 Wall. 655.
Washington Ave. Case, 69 Pa. St. 352.
Reed v. Erie, 79 Pa. St. 346.

It precludes our showing a lack of each and every one of the conditions precedent to the existence of any power in the city to act at all.

Perhaps the foregoing are the *principal* reasons wherein the trial court found the city entirely without power or jurisdiction to order the paving or act at all in the matter.

Of course, it is my contention that the City having lacked the power to order and construct the paving, it necessarily lacked any power to assess its alleged cost. I think the State Supreme Court concedes this.

But don't let me be understood as saying the foregoing,—only *eight* fall-downs,—are the only *essential* charter short comings of the City in this matter.

(1) I have, heretofore, in my "statement of facts" in this brief preceding the argument proper, called attention to the changes in the plans and specifications, changes of grades, failure to construct the alleged improvements of any material

in accordance with even the insufficient and dead petitions, the void ordinance, or the contract the city was totally without jurisdiction to let, all in direct violation of charter proviso "Fifth" of said § 3, which reads as follows:

> "The resolutions and orders of the board of public works may be modified, confirmed or rescinded by said board at any time *prior to the passage of the ordinance authorizing the improvements.*"

Is it possible the city authorities read this *literally* and justified subsequent alteration of plans, etc., on the theory now proven to be correct that no *ordinance authorizing the improvement* was ever passed?

(J) Violation of the State Constitution, (Art. X, § 3, which reads:

> "That the provisions of this section (providing that taxes shall be levied and collected by uniform laws per valuation) shall not affect such *special assessments for benefits* as the corporate authorities of cities, towns or improvement districts may assess and collect under provisions to be prescribed by law."

This section of the State Constitution, as well as § 1, of charter article 7, expressly limits the amount of special assessments to the amount of *special* benefits derived therefrom.

Denver v. Knowles, 17 Colo. 204.

The charter provisions limit the exercise of the

conditionally granted power to pave to the "*mode*" prescribed.

The complaint alleges and the trial court found this alleged assessment was *not* based upon but was in disregard of benefits; (pp. 22 & 23); that the conditions precedent to the exercise of any power at all by the city did not exist; and that the *mode* prescribed was not followed.

Clearly, under no conceivable theory, can an assessment made in disregard of either a constitutional or a legislative provision be cured by *city* ordinance.

There are many broad distinctions between the power to tax for the *support* of the State government, and the power to levy special local assessments for *benefits* conferred.

In the one case usually the power is granted in *general* terms which leave a *discretion* in the grantee as to what *mode* to select. In the other case it is limited by *conditions precedent*, over at least one of which (property owners petitioning), the city has no control, which condition precedent may never arise, and a *mode* of procedure which must be strictly followed. Until that condition exists and unless the prescribed procedure has been regularly followed no power exists.

Judge Elliott in his work on Roads and Streets (2nd Ed.), § 546, speaks of the proceedings of cities in assessment cases as "*creating* a *new* right" and in the next section says:—"The analogy between *general* tax laws and statutes delegating authority to levy local assessments is far from close," that it is "not just to place assessments for special benefits on the same footing as general taxes," explaining that

the first is a *necessary* power usually granted in *general* terms in the mode of exercise of which the city is given a discretion, whereas the latter is an *extraordinary* statutory power for the city on special occasions only when a given state of facts exist, and then only in a particular prescribed *mode*, to *create* in its own favor an extraordinary right to place compulsory burdens on private property,—not as a *necessity* to the support of the government,—but *in exchange for* compensation received by the property in the form of special benefits to be conferred.

Turpin v. Lemon, 187 U. S. 51, 57.
Denver v. Knowles, *supra*.
Chamberlain v. City, 34 Oh. St. op. 561.

(K) No notice of the *time* and place for hearing was ever given, or opportunity to defend as of *right*, before the council ever afforded.

This is perhaps as good a place as any to call attention to the fact it affirmatively appears from the record and the recitals of the so-called assessing ordinance itself, as well as being *affirmatively* alleged in the complaint (pages 15 and 16) and expressly found from the evidence as a fact by the trial court, that no notice was ever given the plaintiffs of a *time* and place where they might be orally heard upon their written complaints and objections filed.

Perhaps, to be more exact as to just what specifically affirmatively appears from recitals in the so-called assessing ordinance, I should say it there affirmatively appears the council did not consider it *essential* (under the 14th amendment or otherwise) they afford any opportunity whatever for any oral

hearings, and they did not consider it a *right* of the property owners to give any evidence or testimony whatever in support of any written complaints filed. In other words, that the council's construction of the meaning of the language "will be *heard* and determined by the council" was that it meant merely a *considering* by *hearing read* at a council meeting without more, and then arbitrarily determining by them the *written* complaints, without any oral or other hearing than a mere *hearing read* the written complaints and objections filed.

I submit with confidence that this *affirmatively* appears from the recitals in the so-called assessing ordinance set out at pages 17 and 18 of the Agreed Record. After reciting the giving by the city clerk of the "Notice of Completion of a Local Improvement and Apportionment of the Costs Thereof,"—(the original of which was offered in evidence by plaintiffs on the trial in the lower court as a part of Deputy City Clerk Weber's testimony, and appears at page 36 of the Agreed Record),—said recital in the so-called assessing ordinance proceeds to recite as follows:

> "Whereas, said period of 30 days has expired, and the city council, sitting as such board of equalization *has considered* all complaints and objections *filed as above provided* (i. e., '*made in writing*'),—has *determined* the same were without merit, and has *declined to recommend* to the board of public works any modification of said assessments."

There is no recital of any notice of any time or place or opportunity for hearings.

It is to be remembered in this connection that while it may be said with considerable show of reason that the *place* of meeting of the city council sitting as a board of equalization or otherwise is the City Hall. There is, however, unless I am much mistaken, no provision in the Charter prohibiting their meeting elsewhere. I do not think I am going outside the record of what the courts in Colorado were bound to and did take judicial notice of when I state that the City Hall in Denver was burned just about the time of this alleged assessment—and the council consequently was compelled to and actually did hold meetings elsewhere during its remodelling.

Whether a court take judicial notice of the actual happening or not, it is sufficient (to illustrate my point) it will take judicial notice of the *possibility* of such a thing.

But as to the *time* of meeting, there can be no question that is *not provided for* by Charter. The meeting was a *special* meeting, and is fixed and permitted by the Charter section in my Statement of Facts quoted only to be fixed, by the mayor in his call for the special meeting. Neither the *time* nor place of meeting was stated in the advertisement (p. 36) to file written complaints and objections.

It was specifically alleged and specifically proven by testimony and evidence to the satisfaction of the trial judge,—none of whose findings of facts are attempted to be disturbed by the State Supreme Court,—that,

> "the city council * * * never met * * * for the purpose of *hearing* or determining said complaints and objections, and did not meet or

pass upon said complaints, protests and objections; * * * that if the members of said city council, or any of them, ever passed upon said protest or objections they denied said protest without notice or hearing to the protestors or objectors or any of them when not called or properly in session; and they pretended to deny such protests solely and only on the ground that the same raised objections with which they had no right to deal; * * * all of which was done without the notice or knowledge of any of these plaintiffs or any of objectors, and they did not nor did any of them have opportunity for hearing, nor were any of the complaints and objections ever passed upon or determined by the city council sitting *as a board* of equalization."

That there was, in fact, no notice, in fact given property owners of the *time* or place of meeting, further affirmatively appears from the lack of any *record* of any such notice in the record book of the "Proceedings of the City Council" from which Mr. Weber read *everything* that appeared with reference to this district.

> "A city council can only speak *by its records*, and its records read and signed are the *only* evidence of its action."
>
> Town v. Eversole (Ky.), 96 S. W. 478.
>
> Tracy v. People, 6 Colo. 151.
>
> City v. Sullivan, 11 Colo. 483.

The City Charter was a public act of the legislature, and at Art. III., § 15, provided:

"The city clerk or a deputy, shall attend all meetings of the city council and keep a true, full and correct record of the proceedings of each meeting."

Had there been any notice to property owners of the *time* and place of the meeting authorized, it must of necessity have appeared in the records.

But there never was any dispute whatever over this fact. I do not desire or have to go outside of the record to show it. I called attention to it in my petition for rehearing (p. 58, point 2, subdivision "b") and more at length in the brief filed in support of that petition. I quote verbatim from that brief as applicable here as follows:

"While we differ with the court as to the sufficiency of the charter provisions regarding notice to property owners as to when and where they may be heard upon their objections to an assessment, in that the law nowhere provides for any notice to be given to those who file complaints, yet, even adopting the court's position, that the provisions referred to contemplate the giving of notice and the appointment of a *time* and place where the parties may be heard, the procedure in the Londoner case conclusively shows that the plaintiffs or their grantors did file written complaints and objections in strict compliance with § 30, and that the council failed to notify the parties so objecting when and where they could be heard. From Deputy City Clerk Weber's testimony, this clearly appears. After producing the protests Exhibits 'D' and 'E,' filed by the property owners in strict pur-

suance of Charter, section 30, and showing, by the official record of the city clerk, that the protests had been unceremoniously overruled by the council, the following questions were asked and answers given (Abstract, folio 442):

'Q. That was acting on those protests? A. Yes, sir.

'Q. And the only action had on those protests which have been introduced in evidence? A. The only action had; yes, sir.

'Q. And that was the only action had that day on the 8th Avenue pavement? A. Yes, sir.

'Q. Or since? A. Yes, sir.'

"The opinion in the Brown case clearly holds *that the law itself* must expressly provide for such a notice to the property owners, and that it is not sufficient that he had a hearing, as a matter of favor, or that a hearing might have been provided without violating the intent of the law. And even the opinion in this case admits that such a hearing *must* be provided. This holding, taken in connection with the fact that the property owners, as the record discloses, did file objections to the apportionment as advertised, and that they made diligent inquiry of the time and place of such hearing, and made every effort to be present, and that they were in no manner notified of the hearing, must inevitably result in the conclusion that the *procedure itself* was, in this instance at least, unconstitutional, no matter whether the law itself is inherently unconstitutional or not. But should

the rule laid down in the Brown case, that a law shall be tested, 'not by what has been done under it, but *by what is authorized by virtue of its provisions*,' be applied to the case at bar, there can be no doubt that the charter provisions must be declared unconstitutional; for while the council might, under the sections referred to in the opinion, and while the law may even contemplate that it should, give notice of the *time* and *place* when they will, sitting as a board of equalization before the assessment, proceed to determine the complaints before them, yet we seriously doubt whether (at least previous to these decisions) this court would hold that the section was sufficiently express to authorize a mandamus to compel them to give such a notice and hearing. Where, in the law, could an aggrieved property owner refer the council to a provision saving to him the right of notice and hearing, and how, and in what manner, such notice was to be given? Under the present ruling the council might publish it for one day or one year, in a daily, weekly or monthly paper, or might, if it be not entirely without the bounds of reason, post it on the back door of the city stables, or on top of a pole similar in height to that on which the Roman tyrant Caligula posted notice of his laws. This is one of the reasons for the contention that the charter provisions are not at harmony with the requisites of due process of law as there (in the Brown case) defined. Neither the time when, the manner in which or the matters to be contained in the notice, nor the place where, and the mode or

method of conducting any such hearing is provided or intimated. Surely this is not sufficient. But notwithstanding all this, there can not possibly be any doubt, under the court's own contention, that the procedure in the Londoner case, where the property owners filed objections and tried in vain to be heard, and no notice was, in fact, given by the city, was invalid and deprived the property owner of his property without due process of law. We feel sure that the court will appreciate our calling their attention to this fact so that they can apply the law applicable, as construed by it, and insure, in the future, to the property owner, *that hearing which they have said the law contemplates he shall have*, for in the records of none of these cases does it appear that the city exercised their privilege of giving such a notice, conceded by the court to be so necessary to a valid procedure, and it seems to us rather premature for the court to reverse this case *with directions* that the court enter judgment in favor of the city (even if it did not—it does—clearly appear from the record), *when in the very nature of things it must be so evident that on re-trial we could easily prove that, though requested, no opportunity for any hearing before the council was afforded either at, before or after it sat as a board of equalization.* The construction placed by the learned chief justice on the adaptability and elasticity of the language of section 30 was never placed upon it by the city authorities themselves.

"But when the validity of a law or ordinance is questioned upon the ground that it

authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, *as a matter of favor*, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment can not be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what *has* been done under it, *but by what it authorizes to be done by virtue of its provisions.* This is the doctrine of the following cases, and many others might be cited to the same effect, but reference to them will be found in the cases cited: Stewart v. Palmer, 74 N. Y. 183; Thomas v. Gain, 35 Mich. 155; Davidson v. New Orleans, 96 U. S. 97; County of San Mateo v. Southern Pacific Railroad Company, 8 Sawyer, 238."

Brown v. Denver, 7 Colo. op. 312.

"Many additional cases might be referred to, to sustain the law there laid down. This doctrine is stated in the case of a sewer assessment by the always able Supreme Court of Massachusetts, (my home State), in Dexter v. Boston, 176 Mass. 247, in the following unequivocal language:

> "In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute, according to its terms, will violate the provisions of the Constitution in its application to questions *which may be expected to arise.*"

See, also, White v. Gove, 183 Mass. 333, op. 338.

Bennet v. Davis, 90 Me. op. top p. 167.

Norwood v. Baker, 172 U. S. 269.

This opinion concedes, and all the authorities hold, the property owners are entitled to notice and opportunity to appear at a specified *time and place* before a board or tribunal *competent* to administer proper relief, in order that they may be heard concerning the correctness of the charge before it is made conclusive. The objection that such opportunity was refused is not met by a mere statement, in the language of the portion of this decision contained in the opinion in the Dumars case, "that the city authorities would unquestionably have (but did not exercise) the power to provide therefor, and the charter is not unconstitutional because it does not specifically make provision for such notice." If the charter is not, the procedure in this case is unconstitutional.

Windsor v. McVeigh, 93 U. S. 274.

No procedure which will result, as does that in this case, in an *actual confiscation* of the property of the citizen, can ever be justified by any manner, process or method of reasoning, however astute.

White v. Tacoma, 109 Fed. 32, op. 32-36."

Arbitrary unlimited power, especially when it is not discretionary, does not exist and cannot exist under our republican system of checks and balances. It cannot exist even in State Constitutions, to say

nothing of subordinate bodies and tribunals such as cities and city councils.

Whether or not it be true that charter § 30 be broad enough to authorize the council to give the property owners notice of the time and place when they would be permitted to offer testimony in support of their complaints and objections filed in full compliance with the city clerk's notice to file them, it must be conceded the notice given by the city clerk was not broad enough to call for complaints going to the jurisdiction of the city to act at all in the matter of paving. It called simply for the filing of written complaints and objections "relative to said apportionment." This, of course, means relative to the apportionment of the cost, and does not cover matter going to the jurisdiction of the city to act at all.

That the judgment taken, even on default, can in no case exceed or differ from that asked for in the notice (summons) has been too often ruled on to need extended elaboration.

In Hume v. Robinson, 23 Colo. 359, the court said:

> "A judgment or decree not embraced by the issues raised by the pleadings is a nullity, and open to challenge at any time."

The action of the council in neglecting and refusing to consider such matters as whether or not a petition subscribed by the owners of a majority of the owners of the frontage to be assessed affirmatively appears from the resolution it adopted. As already stated, the council (or such of them as met) resolved that,—

"Whereas * * * the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property," therefore be it resolved, etc., they overrule the protest and adopt the works board apportionment. (p. 41.)

The council seems to have been of the same opinion as the State Supreme Court in considering that "the question of the sufficiency of the petition and the number of owners subscribing it is no longer open" when they sat as an equalization board.

It must be conceded they had no such power even had they attempted to exercise it at that stage of the procedure. They were then sitting as a board of equalization, i. e., they would have been, had the call and meeting been regular. I think I have shown no notice of the time and place of the meeting was in fact given. If such a notice had been given (so as to afford owners an opportunity to appear and be heard relative to the said apportionment) a record of it would necessarily have appeared in the record of their proceedings. The fact it did not so appear of record is conclusive, no such notice was given.

They were not at this time sitting for the purpose of passing on the valibity of the petition and preliminary procedure. This is all the more apparent when one bears in mind the State Supreme Court says it was not necessary in making a so-called finding (had any such ever been in fact made) authorized by proviso "Eighth" (as they construe or legislate it) that any opportunity for hearings be afforded on the question of fact, so authorized to be found under said proviso.

So I assume, as the State Court elsewhere concedes the power to make those findings is not merely discretionary with that limb of the city known as its council, on the State court's own reasoning a finding by the council as to the sufficiency of the petition and other preliminary matters, at this late stage of the procedure, would not be sufficient. The result, of course, being the city authorities were correct in assuming they could not deal with complaints as to the sufficiency of the petition and preliminary matters when sitting as an equalization board.

Such is the necessary result of the reasoning of the State court. In other words, under the charter, said proviso "Eighth" (either as the legislature or court made it) is applicable only to the original creating ordinance and has no application whatever in later proceedings.

In other words, if the council had made any investigation whatever, or granted any opportunity for hearing at all, on these matters declared by the charter essential to exist, or be by valid ordinance found by the council to exist, any investigation made or hearings afforded would be granted as a matter of favor, and not right, to the adversary property owners.

Our State court has several times held that any hearings granted as a matter of favor instead of as of right the equivalent, constitutionally considered, of no hearing at all.

Brown v. Denver, 7 Colo. 305, op. 312.

Hearings before legislative bodies,—(in this case the record affirmatively shows there were none in fact authorized, had or permitted, and that they were considered by the State court unnecessary on these pre-

liminary questions),—not expressly required by the statute to be granted, are had, if at all, as a matter of mere favor and not as of right.

One of the broad distinctions between judicial and legislative bodies, and judicial and legislative action, so far as the right to hearings are concerned, is, that independent of any statute expressly giving the citizen the right to be heard, the former must, in order for their proceedings to be valid, before acting and as a matter of right hear him against whom it seeks to act:

Brown v. Denver, *supra*.
McVeigh v. U. S. 11 Wall. 259, 267.
Windsor v. McVeigh, 93 U. S. 274.
Hovey v. Elliott, 167 U. S. 409.

whereas, as to matters clearly within its legislative discretion (and it has power legislatively to act on no others), the latter may or may not hear him as it prefers:

II Burgess Political Science & Constitutional Law (1891 Ed.) p. 57 & 58.
Williams v. Eggleston, 170 U. S. 304, 311.
Parsons v. D. C., 170 U. S. 45, 52.

In other words, hearings before judicial and quasi-judicial bodies are matters of right; those before legislative bodies (unless the statute expressly grants the right to a hearing) are matters of mere discretion. In the terse language of this court, applied to the right to hearings before judicial bodies, "The liability and the right are inseparable." The case of Brown v. Denver, *supra*, aptly says of hear-

ings before legislative bodies not expressly required by express statute to be granted, are granted, if at all, merely as a "matter of favor."

Any one having had the least experience in hearings before legislative bodies knows this to be the exact truth. A person not a member of a legislative body, in the absence of a positive statute expressly conferring it, has no right to a hearing before it or its committees. It is at least questionable if even a member of a legislative body is ever of absolute right entitled to a hearing before it or its committees in the absense of statute expressly conferring the right. A legislative body may, if it chooses, while acting within the limits of its legislative discretion, enact valid laws affecting both the member and the citizen most vitally, and absolutely decline to permit either to be heard. Certainly if it hears the non-member, it does so as a matter of pure discretionary favor and not as a matter of absolute right.

II Burgess P. S. & Const. Law, *supra*.

The case of Brown v. Denver, *supra*, it will be found on close analysis expressly so holds. That was a sidewalk assessment case in which the Colorado Supreme Court declared the assessment void against the abutter as lacking due process of law. No petition or other preliminary procedure was by statute declared essential to the existence of the power. The power granted was, as nearly as could be in such cases, a mere discretionary power. The city contended and the trial court in that case held that the property owner could not object that the law had afforded him no opportunity for a hearing before the assessment was made because he had in

fact been permitted to be heard before the city council, which was the body making the assessment. In answer to this contention the court said:

> "The doctrine of the authorities is, that whenever it is sought to deprive a person of his property, or to create a charge against it, preliminary to, or which may be made the basis of, taking it, the owner must have notice of the proceedings, and be afforded an opportunity to be heard as to the correctness of the assessment or charge. It matters not what the character of the proceeding may be, by virtue of which his property is to be taken, whether administrative, judicial, summary or otherwise; at some stage of it, and before the property is taken or the charge becomes absolute against either the owner or his property, an opportunity for the correction of wrongs and errors which may have been committed must be given. Otherwise the constitutional guaranties above cited are infringed.
>
> "Learned dissertations upon the meaning of the phrase, due process of law, have been written by judges and law writes, but as applicable to summary proceedings of the character under consideration, its meaning is comprehended in the foregoing paragraph. If the law authorizing the proceedings provides for notice to the owner of the property to be affected, and gives him an opportunity to appear at a specified time and place, before a board or tribunal competent to administer proper relief, in order that he may be heard concerning the correctness of the charge before it is made conclusive, the constitutional requirements are satisfied.

"But when the validity of a law or ordinance is questioned upon the ground that it authorizes the taking of property without such notice or hearing, the objection is not obviated by proof that a hearing has been had, as a matter of favor, in the case. Nor does it satisfy the constitutional requirements that the assessment is fair and just. A valid assessment cannot be made under an invalid law or ordinance, and its constitutionality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions. This is the doctrine of the following cases, and many others might be cited to the same effect, but references to them will be found in the cases cited: Stewart v. Palmer, 74 N. Y. 183; Thomas v. Gain, 35 Mich. 155; Davidson v. New Orleans, 96 U. S. 97; County of San Mateo v. Southern Pacific R. R. Co., 8 Sawyer 238"

That case, as I have already stated, involved no question concerning the existence of any petition or other statutory prerequisite. It involved the constitutionality of a legislative act attempting to confer on the municipality unrestrained and purely discretionary power to assess property by special assessment without affording any right to any hearing whatever.

It is of course unnecessary to add, the case at bar involves in addition, the determination of a question of fact essential to the existence of a conditional grant of power.

"Jurisdiction must exist before irregularity can occur." Jurisdiction is and must be open to in-

quiry. Otherwise the mere assertion of the claim of right to do, would be conclusive of the existence of the right claimed.

If authorities are necessary to establish that the preliminary procedure having been taken without the statutory prerequisite of a duly presented majority petition, the entire procedure is void and cannot be cured on the assessment, they exist in abundance. I cite but a few of the many.

In the Manning v. Den., 90 Cal. 616 the court said:

> "The provisions in the latter part of section 11 that 'no assessment shall be held invalid except upon appeal to the city council,' etc., has no application to a case in which an appeal is not authorized, or in which, even if taken, the city council could not have remedied the defect. The legislature did not intend to declare that the owner should be deprived of his defense to any claim upon an assessment, where the assessment was void because of incurable defects, because he had failed to invoke the aid of a tribunal which was powerless to grant him any relief. Their denial of relief may have been based upon the express ground that the matter appealed from was not such as they could remedy, and therefore they would decline to take any action. If, however, they had expressly determined that the assessment was valid and the previous steps regular, their decision would not have any binding force. Being a tribunal of limited jurisdiction, unless the facts conferring such jurisdiction existed, their action would

be void, and it would be competent at any time to show that they had no jurisdiction to determine the question."

Ahern v. Board, (Colo.) 89 Pac. 963.

Armstrong v. City, 12 Utah, 476; s. c., 168 U. S. 232.

Warren v. Chandor, 115 Cal. 382.

DeHaven v. Brendes, 135 Cal. 181, 182.

Wallacott v. Meekin, (Cal.) 91 Pac. 612.

Hassan v. City, 65 N. Y. 520; s. c., 67 N. Y. 529.

Merritt v. City, 71 N. Y. 309.

Miller v. City, 149 N. Y. 289, 298.

Strout v. City, 26 Oreg. 294.

City v. Mack, 139 Ind. 99, 109.

Walch v. Barron, 61 Oh. St. 15, 23.

Wheeler v. City, 149 Mo. 36.

Fox v. Town Co., 96 Ky. 262.

Jones v. Holzapfel, 11 Okl. 406, 420-422.

Howell v. City, 3 Wash. 711, 714.

City v. Northport Co., 27 Wash. 543.

Hayes v. County, 92 Wis. 429.

City v. Foster, 133 Ala. 587.

Watkins v. Griffith, 59 Ark. 344.

City v. Fox, 171 Pa. St. 343.

Town v. Dominice, 9 N. M. 624.

Smith v. City, 49 Neb. 883.

Leavitt v. Bell, 55 Neb. 57.

Grant v. Bartholomew, 58 Neb. 839.

Sewall v. City, 20 Minn. 511.

Kerr v. City, (Tex.) 35 S. W. 694.
Frosh v. City, 73 Texas, 401.
Comstock v. City, (Iowa) 111 N. W. 51, 54.
McLauren v. City, 6 Dakota, 397.

I agree with Judge Gabbert in his opinion that the council, sitting or pretending to sit, in this case as a board of equalization for assessment, is only authorized to consider objections filed "relative to the apportionment" of the cost, and is not authorized to consider or pass upon jurisdictional preliminary matters going to the basis of the power of the city to act at all. In this I think I am supported by the long list of authorities just cited, and by the action of the city authorities upon the protests filed, as shown from the record. That the city authorities viewed their powers under the proceedings at this stage of the procedure in accordance with this view is supported also from the express recitals (to say nothing of findings) in the so-called assessing ordinance, none of which anti-date the creating ordinance.

Their lack of power to at this late stage of the procedure find as a fact no petition subscribed as required existed, is further emphasized by the fact that by making such a finding they would, of necessity, violate the obligations of the necessarily implied, if not indeed express, contract made between the city and the contractor or purchasers of the improvement bonds theretofore issued that they would make at least a so-called assessment against the property in the claimed district.

City v. Nat. Exch. Bk., 34 Colo. 387.
Barber v. Seattle (Wash.), 85 Pac. 11.

It does not lie in the mouth of the city to say,—(as it would of necessity say by a finding its procedure was invalid),—to the bondholder that he should be deprived of the right which his contract secured to him to have all the resources of the city exhausted to make at least a make-believe assessment (such as that in this case) so that "all moneys collected on account of the (so-called) assessments * * * shall be applied to the payment of the bonds." (Charter § 43.)

In view of the well known fact of which the court will doubtless take judicial notice that a large percentage of property owners (unless the alleged assessment is palpably unjust), usually take advantage of charter § 35 permitting a discount, or rather refund from the face of the assessment, of the 6 per cent added to the actual or supposed cost of the work "for interest to the next succeeding date" when the first installment of the assessment or alleged assessment (if paid in installments) is due and payable, and pay in full within the 30 day period, it is readily apparent that this contract right of the bondholder is a valuable one.

City v. McGovern, 226 Ill. 403; s. c., 80 N. E. 890.

Especially is this so when one considers that any payment made by property owners within the 30 day period is of necessity a voluntary payment (made before the city can possibly resort to any compulsory process of collection), and by reason of being voluntary as well as for other reasons, cannot be recovered back.

In Richardson v. City, 17 Colo. 398, approved

in the very recent case of Mitchell v. Town (Colo.), 92 Pac. 678, the court said:

> "In the absence of statute there are three requisites to the right of recovery for money paid by reason of illegal taxation, viz: (1) The assessment must be absolutely void; (2) The money sued for must have been received by the corporation for its own use; (3) The payment must have been made upon compulsion and not voluntary."

It requires no argument to establish that a payment made without compulsion would be a voluntary payment. The compulsion must be actual and present, not merely imminent or in future.

Stover v. Mitchell, 45 Ill., op. 217.
Elston v. City, 40 Ill. 514.
City v. Chalfant, 52 Cal., op. 171.
Forbes v. Appelton, 5 Cush. 115.
Phillips v. Board, 5 Kas., op. 416.
Lamborn v. Kent, 97 U. S., op. 186.

Any payment made before the property was advertised for sale (and it could not, under the charter, be advertised until the fall after the alleged assessment), would of necessity be a purely voluntary payment.

Decker v. Perry (Cal.), 35 Pac. 1017.
Ry. Co. v. Commissioners, 98 U. S., op. 544.
Barret v. Cambridge, 10 Allen (Mass.), 48.
Lee v. Inhabitants, 13 Gray (Mass.), 476.

Woodland v. Webber, 52 Cal. 73.
See, also, II Cooley Taxation (3rd Ed.), 1487-93.
2 Dillon Mun. Corp. (4th Ed.), §§ 939-40.

I venture the assertion that the council at the assessment stage of the procedure could be enjoined by any bondholder from then making any finding, or recital even, which would impair the value of their bonds.

This brings me logically to a consideration of what the real purpose and meaning of said proviso "Eighth" is. What, in my humble opinion (especially if the court's construction be correct that said proviso does not require any "notice duly given" or hearings to be afforded the adversary property owner before it makes the so-called finding by ordinance), the legislature clearly intended and what in fact it just as clearly said by the language used in this portion of this "Eighth" of the various provisos enumerating what must first be done before an ordinance creating a local paving district and ordering the same paved can be legally passed, is substantially the following. The creating ordinance it is to be observed, is the basis of authority for the issue of the "public improvement bonds or warrants of the city of Denver," from which (1) through their direct sale by the city and payment for the work in the cash derived therefrom, or (2) through their issuance to the contractor and sale by him, the money necessary for the doing of the work is by § 43 of the same charter article permitted to be raised. By earlier sections in its charter the city has practically plenary authority to "pave or otherwise improve" streets, alleys, etc., and pay for the same

out of funds raised from general taxation. But, as the charter says, and as was so clearly explained by the court in Rhodes v. Board, 10 Colo. App. 99, in paving on the district assessment plan, a majority petition must first be presented in order for the city authorities to act at all, then plans, specifications, estimates, etc., drawn and a form for an ordinance to create the improvement district recommended by the works board to the city council for passage. This ordinance, if legal, and this ordinance only, creates the improvement district (which before did not exist) and authorizes the issue by the city of its public improvement bonds and warrants. Unless the necessary jurisdictional conditions precedent to their issue exist, in the absence of a conclusive recital, these bonds even though issued would be void and their validity could be questioned by any one interested including even the city itself. Unless authorized by law to make a recital, no recital by the city would be binding. This seems too elementary a proposition to need citation of authority, especially before this high court, and I beg leave to cite the following cases only to show our Colorado courts have expressly so held:

Sullivan v. Leadville, 11 Colo. 483.
Keeze v. Denver, *supra*.
Bank v. Town of Granada, 4 C. C. A. 212.
Sauer v. Town, 20 Colo. App. 365.
Mulnix v. Ins. Co., 23 Colo. 71.
Denver v. Hayes, 28 Colo. 110.
Denver v. Nat. Exch. Bk., 34 Colo. 387.

Knowing from experience that the credit of the

city had suffered from the city's denial of liability in the foregoing and other cases, the legislature by this proviso "Eighth" sought to forever obviate this evil by authorizing the making by the city of its ex parte recital (representation) through its council to be included in as a part of its creating ordinance to the effect (1) that the improvement was duly ordered after notice duly given, (2) that a petition was filed as above provided, (3) was subscribed by the required number of property owners aforesaid and (4) that no proper remonstrance against the improvement had been filed by property owners. In other words, its duly authorized representation that when the time for issuing bonds began the authority sufficient to operate as an estoppel on the city to issue them existed. This recital the charter says, "shall be conclusive in every court or other tribunal." The charter does not say upon whom it shall be conclusive. But upon whom can such a recital of pure fact without opportunity for an adversary to defend be conclusive,—on the party by and in whose favor it is made (i. e., the city acting through its council),—or on the property owner later by the city in the same proceeding to be assessed (strangers to the recital) against whom without right, notice or opportunity to defend, as adversary, the city is acting? It certainly seems to me that the mere question furnishes its own answer.

The charter does not say that the recital shall be conclusive upon the adversary property owners. It is only by judicial legislation,—mis-termed construction,—the Colorado court legislates into the proviso the words necessary to make it appear to in-

clude the abutter. In so doing they render the proviso as they construe it unconstitutional.

It is worthy of note in this connection that the charter makes no express provision for any recitals in the bonds or elsewhere than by this proviso under consideration. It is, however, certainly just and proper if not indeed indispensible in order there may be a ready market for these bonds, that innocent holders should be protected and not ultimately suffer by the city later showing that jurisdictional prerequisites to its own power to issue the bonds did not exist, or that it had no authority to make any recital at all, and the bonds consequently void.

For this very reason, and as it seems to me for this reason alone, the charter has provided that the duly authorized representatives of the city (its council and mayor), may in its name and on its behalf, by ordinance, represent, hold out and make for the benefit of the holders of these bonds and warrants its duly authorized ex parte recital, which the charter says shall be conclusive in every court or other tribunal, upon itself the maker, to the effect in substance that the jurisdictional charter prerequisites lying at the base of its power to issue the bonds and warrants exist. The real purpose and legal effect of such a recital, it seems to me,—(considering adversaries have no right to defend),—is simply to estop the city itself from questioning the validity of these bonds and warrants for the payment of which it is and should be ultimately liable.

Judson on Taxation, section 386.
Denver v. Bank, 34 Colo. 387.
Phila. M. Co. v. City, 19 Wash. 225.

Moore v. Mayor, 73 N. Y. 239, 248-251.
Bill v. Denver, 29 Fed. 344.
U. S. v. Fort Scott, 99 U. S. 152.
State v. Superior, 81 Wis. 650.
Memphis v. Brown, 20 Wall. 289, 311.
Barber Co. v. Denver, 72 Fed. 336.
Barber Co. v. City, 12 C. C. A. 100.
Hitchcock v. Galveston, 96 U. S. 341.
Iowa Co. v. Callanan, 125 Io. op. 366.

(L) There was one other question side-stepped by the court in this case, and that is, whether or not when a petition exists and all the procedure is in strict accordance with the charter, and complaints against the apportionment of the assessment are duly filed (as the record pp. 37 to 39 affirmatively shows they were in the case at bar) by property owners questioning the amount of benefits received and apportionment of the costs, it is necessary the council provide a time and place for hearings and notify the objectors of that time and place?

The State Court said this is "a point, however, which we do not decide." In other words, they deny us due process of law by declining to hold these proceedings, where admittedly no such notice was given, void. Is not that the effect of what they say? They attempt to deprive this court of its right to reverse this case, as it doubtless would do, had the State court decided it was not necessary, by saying it is a point they "do not decide." It was a point necessarily involved in the question of the validity or invalidity under the 14th Amendment, of this alleged assessment, and it was directly presented for decision.

That such a notice of the *time* and *place* for hearings was essential, see:

Denver v. Dumars, 33 Colo., op. 98.
Brown v. Denver, 7 Colo., op. 313.
State v. Perth Amboy, 29 N. J. L. 259, 262.
Durant v. City, 25 N. J. L. 309.
McGavack v. City, 40 Neb., op. 76.
Hopkins v. Mason, 61 Barb. (N. Y.) 470.
Merritt v. City, 71 N. Y. 309, 314.
Town v. Hobbit, 19 Ill. App. 259, 261.
Myers v. Shields, 61 Fed., op. 718.
County v. S. P. Ry. Co., 18 Fed. 385, 410.
Gray Lim. Tax. Power, § 1153.

I have already shown, in the discussion under (K), that no such notice was ever given in the case at bar.

(M) There is but one further point I desire to make in this case (covered by assignment "Ninth"). In substance it is that hearings had before the council concerning the apportionment would be useless because said council is by the charter provisions without power to grant any relief.

If I am correct on any of the points already made, this point is doubtless unnecessary to a decision of this case. But the action of the State Supreme Court in repeatedly in this and other cases substituting its own language for that of the legislature in the act, merely to uphold its constitutionality, is so glaringly vicious, establishes such a dangerous precedent, and is so totally unwarranted

by any legal principle, I shall approach its consideration with considerable confidence that this court will hold with me and declare, as it did in the Rollins case, and other cases cited, *supra*, that where the language used by the legislature is free from ambiguity, there is no room for construction, and that it is the duty of courts to read a law "as it is and not as it might have been" or as the State court would perhaps have preferred it to be.

This court, I am sure, will appreciate how easy it would be for any State court to uphold any law, however vicious and flagrantly in conflict with due process of law or other provisions of the federal constitution it might be, if permitted by judicial legislation (mistermed construction) to re-enact it in such form as they see fit. In this manner State courts could preclude relief from their purely arbitrary legislative-judicial act, if the construction they, by practically re-enactment, place upon a statute is to be adopted by this court without question.

I refer to the action of the State court on page 117 of the opinion in this case in substituting the discretionary word "may" for the mandatory word "shall" used by the legislature in § 31, being one of the assessment sections of the charter.

By so doing they succeed by judicial legislation in granting the city an additional extraordinary power, which the legislature never granted, and this notwithstanding the language used by the legislature is entirely free from the least ambiguity, and in the face of the unbroken line of decisions and text-books, including some of the decisions of the Supreme Court of Colorado which might be cited, to the effect that "in the construction of a charter to be in doubt is

to be resolved; and every resolution which springs from doubt is against the existence of the power in the corporation."

This language, applied as it is to municipal powers generally, is of course a thousand times more applicable when applied to an extraordinary power a summary proceeding such as this.

I concede there is an ambiguity in the last five words of § 31 and a question as to whether they refer to the final arbitrary decision of the works board, of the arbitrary front-foot rule in charter § 4. But that is the only ambiguity, and it is not concerning that which the court assumes to construe.

Whichever of the two constructions is the correct one as to the meaning of the words "in the proportions above mentioned," there is no ambiguity as to the power or rather lack of power of the council in the assessment. It is given no discretion whatever as to how it "shall" or "may" assess.

Charter § 4 says the council "shall" assess by the arbitrary front-foot rule. Charter § 31 says the council "shall" adopt the arbitrary final decision of the works board on an apportionment prepared under § 29 in accordance with § 4, which apportionment the works board alone is granted—without opportunity for hearings,—the power under this § 31 to alter.

The truth is, legislating the word "shall" into "may" really does not help the dilemma. It simply puts a little different phase upon it.

Reading the section as the legislature enacted it, the council is prohibited from exercising any discretion. Reading the section as the court has en-

acted it, the council is not prohibited from exercising a power never granted it.

The power granted is:

> "The city shall have power to contract for and make local improvements, and to assess the cost thereof * * * as hereinafter provided." (Art. 7, § 1 Charter.)

The manner "as hereinafter provided" is according and without deviation from either (a) the final decision of the works board, or (b) the arbitrary front-foot rule provided for in §§ 4 and 5.

Whether the words in § 31 "in the proportion above mentioned" refer to the arbitrary final decision of the works board (arrived at without opportunity for hearings), or the arbitrary front-foot rule mentioned in §§ 4 and 5 of this charter article, the assessment of necessity must be against all the real estate in the said district respectively "IN THE PROPORTIONS ABOVE MENTIONED."

In order simply to uphold the charter section against the violation of due process of law objection urged, the court, through Judge Gabbert, says (op., p. 117), the word "SHALL" should read "MAY." As I shall show, even this attempt to uphold the constitution by its violation does not overcome the force of the objection urged against its constitutionality.

The only reason given by the court for altering the language used by the legislature is that not to do so "would render it obnoxious to a constitutional inhibition" meaning of course the constitutional guaranty of due process of law.

I contend that the imperative inhibitions of the Federal Constitution THE SUPREME LAW OF THE LAND, are not to be thus easily disposed of, by a State court in effect resolving itself into a legislative body.

There must be something more than that merely "to read a law as it is written" would be to read a clearly unconstitutional enactment, to justify a court resorting to "construction," much less legislation. "Where there is no ambiguity there is and can be no room for construction."

The power (rather the lack of power) of the council under § 31 is not ambiguous in the least.

The opinion on page 117 says the council is still left with "the authority to pass an assessing ordinance in accordance with its own judgment."

In reply let me ask, even with the mandatory word "shall" changed to "may," WHERE is the council granted this discretionary power?

The State court has not attempted to "show" the property owner, who may be in the same state of mind as the proverbial gentleman from Missouri.

In the trial and State Supreme courts I made the point that the works board was a "special commission" created and existing solely by special legislation in violation of the State Constitution, and that by the language of charter § 31 it was in reality and to all pratical intents and purposes the "special commission" and not the city which makes the assessment. The State Constitution prohibits any power to "make, supervise or interfere with municipal improvements" being granted to a special commission.

The opinion (pp. 115 to 117) concedes that no hearings are permitted before the works board in the

matter of the apportionment, and so if the works board has the final decision as to what the assessment shall be, the whole charter procedure would necessarily be unconstitutional in violation of both the State and Federal Constitutions.

In my contention that it was in reality the works board and not the city council, (before whom only hearings are in any possible view permitted), I called attention to charter §§ 29-31 and showed that by the provisions of said § 29 the works board first prepares the proposed apportionment and sends it to the city council in the form of a bill for an assessment. The city clerk then publishes the advertisement provided for in § 30 that the council at some unstated future time will sit as a board of equalization to determine the written complaints and objections that may be filed concerning the proposed apportionment of the costs theretofore prepared by the works board for the council to enact into an assessment. By § 31, after the council sits as an equalization board, if it desires any changes or alterations made it recommends to the works board such modifications in the proposed apportionment "made by said board" of public works as it sees fit, and the works board (without any hearings before the works board) may (in the language of § 31) thereupon make such modifications and changes as to them (the works board) may seem equitable and just, or it (the works board) may confirm the first apportionment, (theretofore made by the works board itself without hearings) and shall notify the city council of THEIR (the works board's) FINAL DECISION; and the city council SHALL thereupon by ordinance assess the cost of said improvements against all the real

estate in said district respectively "IN THE PROPORTIONS ABOVE MENTIONED."

No power exists in the council to alter that arbitrary rule of apportionment in the assessment. The charter provisions, even on the State court's theory, comes clearly within the rule laid down in Norwood v. Baker, 172 U. S. 269.

And this regardless of whether we adopt the legislative enactment § 31 of the Colorado General Assembly, or the legislative enactment § 31 of the Colorado Supreme Court.

I submit that the words hearing "before a tribunal competent to administer proper relief" quoted from the Brown case (7 Colo. op. 312) cannot mean "before a tribunal competent to do nothing" but obey either the works board's final decision, or the arbitrary charter front-foot rule.

Windsor v. McVeigh, 93 U. S. 274.

The construction placed in this case (33 Colo. bottom p. 111 and top of p. 112) by the State court on the word "competent" as used in the definition of the term "competent tribunal," that it means "the tribunal that the law designates shall be suitable and legally qualified to act," certainly does not mean a tribunal only possessed of power to decline to act, because not possessed of any power to grant any relief.

It may be said that the language used in § 31, "in the proportion above mentioned," is somewhat ambiguous and is perhaps open to two different constructions, the adoption of either of which, however, is equally fatal to the lack of power of the city. If it refers to the adoption of the "final decision" of

the board of public works, it deprives the city council (the legislative power of the city) of all power in the premises and makes it a mere automaton or tool of the works board (which is conceded in that event to be a "special commission" existing in violation of the State Constitution) and which is really the final *arbiter* (although no hearings whatsoever are permitted before it). If the other horn of the dilemma is adopted, i. e., that the council assess by the arbitrary rule mentioned in §§ 4 and 5, it renders the city council equally powerless and the assessment equally arbitrary without any regard to benefits to or damage caused by the alleged improvement, for if the words "above mentioned" refer (as adopting the court's construction they necessarily do refer) to the arbitrary fixed rule of apportionment, it is equally objectionable and renders any hearings that the council might by any possibility condescend to provide for or give, ineffectual and nugatory. In either event the property owner, in effect, as well as actually, is notified by the notice of proposed assessment that no matter how grevious and just his complaints, or how much damaged instead of benefited his property, while he may complain, it will be useless for him to do so, for no relief can be had or alteration made in the apportionment.

Brown v. Denver, 7 Colo. op, 311-312.
Lathrop v. Racine, 97 N. W. 192.
Norwood v. Baker, 172 U. S. 269.

Could the council, for instance, in obedience to its charter authority,—the only authority it possessed,—have assessed Mr. Sheedy's 4-foot x 125-foot

cost but on any other basis than by the front foot? That, as I have shown, actually confiscates it.

To substitute for the general assembly's mandatory word "shall" the court's permissive word "may," so that the charter section reads that the council "may" assess the cost as apportioned by the board, does not meet my contention that the council renders and can render no suitable or "proper relief." The mere fact that the use of the word "shall" will result in an unconstitutional law, is no sufficient reason for applying rules of construction to an unambiguous act. And the act is certainly not ambiguous as to the power, or, more properly speaking, lack of power, of the city council to alter the apportionment arbitrarily fixed by legislative fiat.

It therefore becomes, under this branch "M" of my argument, purely a question of the power of the legislature to confiscate private property under the guise of a special assessment for benefits.

While it is doubtless true the legislature has a large discretion in providing what the character of the notice and procedure in the hearing shall be, the same as it has concerning the character of the notice and procedure in court proceedings, there is absolutely no question but reasonable notice and adequate opportunity for hearing must be given. And the body granting the hearings must be possessed of the power to "afford proper relief" to which the complainant may show himself entitled.

As I have already shown, no hearings were granted in the case at bar. And no hearings that might be granted could, if the city obeyed its charter authority,—the only power or authority it possesses,—accomplish that object.

The object of any hearings at all must be to correct errors and afford proper relief. I have shown no relief, such as the plaintiffs certainly showed themselves entitled to, either was or could be granted.

It was very recently said by this court in Roller v. Holley, 176 U. S. 398, 409, in passing on and holding not due process of law a five-day notice provided for in a Texas statute:

> "It is manifest that the requirement of the notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose."

The same may be said of hearings and the competency of the bodies before whom hearings are to be conducted. Unless the hearing is adequate and the powers of the body before whom it is to be had sufficient to ensure to the party heard a thorough investigation of the questions of fact at issue, and the granting relief to those entitled to relief, it is valueless and worse than farcial. Without dwelling upon it (for I do not assume it necessary in order to reverse this case), I submit that under the 14th amendment in order that a tribunal shall be "competent" to conclusively determine a question of pure fact declared by the legislature essential to jurisdiction to act and grant competent relief from an unjust confiscation of properiy, it must have at least *quasi*-judicial power,—power to issue process, power to take testimony, to insure a fair investigation, to summons and compel the attendance of witnesses and giving of testimony, to punish for contempt for refusal to obey its orders,—in short to really fully hear and impartially determine and grant adequate

relief. And the party sought to be concluded must have the co-relative right to give testimony, also probably to cross-examine witnesses on the other side, at any rate to use the process of the tribunal to compel the attendance of witnesses and giving of testimony,—in short, to be fully heard upon all the questions of fact involved. Less than this, I submit, would of necessity be inadequate to constitute due process of law.

It must be conceded, in the absence of statute expressly and clearly conferring them, such powers are not possessed by purely legislative bodies.

> Kilburn v. Thompson, 103 U. S. 168, 190-198.
>
> II Hare Am. Const. Law, 855-856.
>
> II Burgess P. S. & Const. Law, 56-7.
>
> McGehee Due Process of Law, pp. 58, 76, 77, 85, 89.
>
> State v. Ryan, 182 Mo. 349.

In the absence of statute declaring otherwise, it is discretionary with legislative bodies whether the powers they possess shall be exercised or not. So any hearings, in the absence of express statute conferring the right, would be granted, if at all, as a mere favor and not of absolute right. As this court says:

> "The right of a citizen to due process of law must rest upon a basis more substantial than favor or discretion."

Just what application the cases of Paulson v. Portland, Gilmore v. Henting, and Gatch v. Des

Moines have to this case, and the application to this case of the point concerning which the State court cites them it is difficult to determine. The court by their very citation necessarily intimate the property in the case at bar was taken without any opportunity to defend. That is the point in this connection in *this* case. What matters it so far as concerns the identical question involved in *this* case,—i. e., whether or not the property of plaintiffs *was* taken without due process of law,— that notice of the *time* and place for hearings *might be given* in *other* cases.

That no such notice was, in fact, given in the case at bar, the record and trial court findings affirmatively disclose. We are at present trying *this* case, not those *other* cases.

If the State acting through its agency the city of Denver or its other agency the Colorado Supreme Court, deprived the plaintiffs of their property without due process of law, that is sufficient regardless of whether or not the city authorities possessed or did not possess a discretionary power which they failed and refused to exercise to give notice of the *time* and place when and where the plaintiffs could be heard "relative to said apportionment." The court by thus side-stepping the real question there involved and entering judgment for the city in the case at bar by *inference* at least,—an inference too founded on facts and not on pure conjecture,— necessarily concedes the necessity for the side-step and reversal with judgment entry in order to uphold this absolutely void and unconstitutional *attempt* at assessment. The State court *expressly* concedes and the trial court expressly found no investigation or opportunity for hearings was ever had on the juris-

dictional quasi-judicial question of fact lying at the basis of the power of the city to act at all,—i. e., as to whether or not A petition subscribed by the owners of a majority of the frontage to be assessed was ever presented, and whether or not the only power that could be possessed by the city in any case of this character was complied with.

This case is in this connection in a measure very much like Windsor v. McVeigh and Hovey v. Elliott already referred to. The court there doubtless *could* have heard the party, but it declined to do so. The record shows the council went out of its way in the case at bar to approve the apportionment without affording plaintiffs any opportunity to defend, and that the State court side-stepped and declined though requested to pass upon the question of the validity of such action.

As this court in the McVeigh case, *supra*, said:

> "It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere *arbitrary* edict, clothed in the form of a judicial sentence"—(p. 93 U. S. 278).

The refusal of the State court to pass *directly* upon the question of whether or not the property was taken without due process of law was in effect "a recall" of the writ to defend the trial court decree on appeal.

I think I have clearly proven both subdivisions of my first proposition. As before intimated, if the court considered the legislative enactment applicable, why did it legislate? That it did legislate is perhaps the best proof it considered the general assembly's

charter proviso "Eighth" totally inapplicable to this case.

II.

That in the name of construction, but by what in effect amounts to LEGISLATION, the language of said proviso was by the court through a misconception of judicial functions ALTERED to fit the facts of this particular case.

As has doubtless been gleaned from what has already been said under point No. "I," it is apparent the State court found it necessary to and did legislate just four separate times in this one case in order to uphold this make-believe assessment.

What are these instances?

"A."

What is the proviso "Eighth" the State Supreme Court, thus by judicial legislation, substituted for the general assembly's carefully worded proviso "Eighth"? A glance at page 109 in the official report of this case will show. I quote the court's proviso "Eighth" verbatim:

> "But there is a stage in the proceedings when the question of the sufficiency of the petition and the property owners' subscribing it is no longer open, *if the council, in passing the ordinance creating the district, has found the facts* FROM WHICH IT CAN BE INFERRED *that the law in* THIS *respect has been complied with.*"

"In this respect" was, I submit, but one step

of many equally essential steps in vesting jurisdiction in the city to pave.

If we call the above *construction* instead of *legislation*—(its proper name),—it is reasoning on a circle, for it assumes the very facts controverted. We alleged and proved not only lack of jurisdiction in, but that there was no finding whatever by, the council.

Said proviso *without* construction, reads:

> "And the *finding* of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal."

It is pertinent to again ask, conclusive *of what?* Conclusive *on whom?* These two questions I have already answered on pages 114-122, 109-112.

They can, certainly, be conclusive only of the several specific *facts* authorized to be and actually *found*.

The recital (there was no "*finding*"), actually made in the alleged but really *void* ordinance was as follows:

> "That upon consideration of the premises the city council doth find that in their action and proceedings in relation to said Eighth Avenue Paving District No. 1, the said board of public works has fully complied with the requirements of the city charter relating thereto." (P. 12.)

It must be conceded that said recital was not in accordance with the authority granted by the proviso, and the identical authority granted is the only power possessed. It found, or recited even, nothing whatever about the presentation of any petition (singular) designating or not designating any material for a wearing surface subscribed by the owners of a majority of the frontage to be assessed, and made no recital whatever of any "*notice duly given*" by the council. It covers only proceedings of that one integral limb or instrument of the city known as the works board. Concerning proceedings of the works board, in some respects it covers and was construed to conclude as to required jurisdictional action by the works board not authorized by either the general assembly's or the court's proviso to be conclusively or at all determined by the council. While as to the really essential facts, i. e., of "notice duly given" by the council, and of action or lack of action by property owners in first or at all subscribing and filing the required majority petition, and in not subscribing and filing a majority remonstrance, it is entirely lacking. It recites no notice whatsoever given by the council or opportunity afforded by the council for property owners to defend in the premises. The so-called "finding" was not a "finding" in fact. It was and was shown to be a mere mis-recital of an alleged "finding" in a void ordinance. It was, at best, a mere automiton-like adoption by the council without any investigation of the form of bill for an ordinance (not even as prepared, but as assumed to have been) prepared by the works board for the city through its council to enact into an ordinance. As justifying all I have

just said I refer to the above quoted so-called "finding"—(fraudulently interpolated in the real bill for an ordinance prepared by the works board or what not),—in the alleged creating ordinance, to the city charter and to the opinion. It was the only "finding" or recital of any claimed finding purporting to be made under, or purporting in even the slightest degree to comply with, said proviso.

"B."

The question was asked, conclusive of what? The proviso as the General Assembly enacted it does not say. Neither does the court's substitute for the General Assembly's proviso Eighth say. The court through the fruitful process of conjectural inference and legislation answers the question.

The court's legislation did not stop at a mere re-enactment of said proviso "Eighth." It then began to legislate as to the proviso it itself supplied, by making it conclusive of everything almost under the sun.

It is true the court is not quite so frank and outspoken in this instance as in the first. It does not come out and say in so many words "we will alter this language" of the General Assembly so it will read as follows, to-wit,

> 'The word conclusive as used in the General Assembly's proviso and our substitute for it says (a) conclusive of its own validity; (b) conclusive of jurisdiction; and (c) conclusive of full compliance with the law.'

But the court necessarily adds that by inference,

or some other method equally as conjectural. When it reversed the case with directions for judgment against plaintiffs it necessarily said so. It said, in substance, no matter what had been alleged or proven, the assessment should stand.

"C."

The further question was asked, conclusive on whom? The court necessarily by the reversal with directions for the judgment, and by the judgment, adds that by the same character of conjectural inference.

It makes it conclusive on adversary property owners who were afforded no right or opportunity to defend. It makes it conclusive on them of a judicial or quasi-judicial question of fact, in no way involving *municipal discretion*.

It is true the State court does not in so many words say this. To have put it in cold black type in the opinion would have rendered that masterly document absurd. But it was the necessary effect of the reversal of the trial court decree with directions for judgment. Without those two conclusive-conjecture-answers to the two questions "conclusive of *what?*" and "conclusive on *whom?*" the trial court decree necessarily must have been affirmed.

This court has very recently in an opinion by Mr. Justice Peckham said in the case of Security Co. v. Lexington, 203 U. S. 233:

> "If the statute (as construed) did not provide for a notice in any form, it is not material that, as a matter of grace or favor, notice may have been given of the proposed assessment (or

proposed conclusive finding). It is not what notice, uncalled for by the statute, the taxpayer may have received in a particular case,—(and there was none received in the case at bar, nor was there even any investigation whatever by the council before making the so-called finding),—that is material, but the question is whether any notice is provided for by the statute. Stuart v. Palmer, 74 N. Y. 183."

See, also—

Crandall v. State, 6 Wall. 36, op. 43.
Norwood v. Baker, 172 U. S. 269.
Roller v. Holly, 176 U. S. 399, op. 408.

"D."

The remaining of the four separate instances where the State court itself performed the functions of the General Assembly in this case is in substituting the permissive word "may" for the mandatory word "shall" in § 31 of the charter merely to prevent that unambiguous section being unconstitutional. I have already said all I have to say concerning that in sub-divisions "L" and "M" of division I of this argument.

III.

THAT SUCH LEGISLATION by the court in the name of the State was without due process of law, was unauthorized by any law, and in itself constituted a violation of one or both of said clauses of said 14th Amendment, to the great injury of my clients.

"To the great injury of my clients" was merely a confiscation of their property. See pages 20 and 21 of this brief. That is probably as much as need be said on that score.

I claim the 14th Amendment is itself a prohibition against legislation by any other department than the legislature. The word *law* in the phrase "Due process of law" means *law* made by the legislature and not *law* enacted by the State court.

Blackstone has defined law in its most comprehensive sense, as "a rule of conduct." The proceedings in the case at bar illustrate "conduct without rule." The same English author says, "The distinction between legislative and judicial power lies between a *rule* and a *sentence*."

Even if it be true, as I think this court and every lawyer will concede to be more than extremely doubtful, that a State could by its constitution lawfully confer upon one man or upon one body of men executive, legislative and judicial functions,—i. e., authority to make, construe and execute the law,—I contend that man, or any body of men, could not, without a violation of the 14th Amendment, arbitrarily decide cases without regard to any rule. In other

words, he could not, without pursuing any prior general rule, uphold this assessment and declare void another assessment identical to it. He could not, for instance, uphold this procedure and hold that in the Lambert case, or that in the Evans case, or that in other cases cited, void. He would have to be governed by what Blackstone defines law to be, i. e, a "rule of conduct." He would have to apply that same law, or "rule of conduct," to each case of the same class. If he made a separate new, vacillating rule to "fit the facts" of each case presented to him, his decisions would be in violation of the 14th Amendment, as defined by this court and by Mr. Webster in the definitions of due process of law which I shall shortly quote. I respectfully submit that the word law, as used in the 14th Amendment, means a prior, orderly, fixed, reasonable "rule of conduct." It does not mean one new, vacillating uncertain whim, (i. e., lack of law) for one case, and another new, uncertain vacillating whim (i. e., lack of law) for another case identical to it.

Cooley Const. Lim. (7 Ed.), p. 131 *et seq.*

I might enlarge upon this definition and quote text books and authorities almost without number as sustaining my contention. But I do not believe it necessary to do so before this court.

Arbitrary unlimited power does not and cannot lawfully exist under a constitutional government of written checks and balances.

Yick Wo v. Hopkins, 118 U. S. 356.

Judge Cooley, beginning at page 131 of his Constitutional Limitations (7th Ed.), says:

"The legislative power we understand to be the authority, under the Constitution, to make laws, and to alter and repeal them. Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has prescribed. 'The laws of a State,' observes Justice Story, 'are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws.' 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes and the judiciary construes the law.' And it is said that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the law shall be for the regulation of all future cases falling under its provisions.' * * * That is not legislation (nor is it construction) which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such power assimilates itself more closely to despotic rule than to any other attribute of government."

Hamilton very evidently could not have had in mind the possibility of a case such as this when he wrote in No. 81 of the "Federalist":

"It may be observed that the supposed danger of judicial encroachments on the legislative authority, which has been upon many

occasions reiterated, is in reality but a phantom."

Again: "The making of the law is logically antecedent to its execution, and to decisions as to its meaning."

He was then speaking of the Federal courts, a judiciary appointed for life, or during good behavior, —which it is the just pride of all true Americans to say has proven to be synonymous in the case of the Federal judiciary and practically all other judges with similar tenures.

In No. 78 of the same celebrated papers he further said:

"It can be of no weight to say that the courts on the pretense of repugnancy may substitute their own pleasure to the constitutional intentions of the legislature * * *. The courts must declare the sense of the law, and if they should be disposed to exercise will instead of judgment, the consequence would be judicial legislation."

In No. 47, Madison said:

"The accumulation of all powers, legislative, executive and judiciary in the same hands, whether of one, or a few, or many, self-appointed or elective, was justly pronounced (by Montesquieu) the very definition of tyranny * * *. There can be no liberty * * * if the power of judging be not separated from the legislative and executive powers * * *. Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, *for the judge would*

then be the legislator. Were it joined with the executive power, the judge might behave with all the violence of an oppressor."

But the truth is the three departments of government must be kept separate in the State as well as in the nation. The National Constitution itself requires it. Timothy Farrar, in his "Manual of the Constitution" (Little, Brown & Co., 1872 Ed.), speaking in chapter 26 of the guaranty of a republican form of government, at § 226, says:

"Many other particular provisions are emphatically, though indirectly, required by the (U. S.) Constitution, for the State governments, by being made absolutely necessary to enable them to perform their appropriate and required duties as States. The States *must* not only have governments, and republican governments, and constitutions, which must necessarily be *written* constitutions; but their governments *must*, like that of the United States, be divided into three departments, legislative, executive and judicial; for the (U. S.) Constitution assigns appropriate duties to each of these departments, *requiring* their existence and separate organization. The legislative department must also have a plurality of branches; for the Constitution (Art. I) describes one as the most numerous branch, obviously in allusion to its own division into the two Houses of Representatives and Senators. It would seem that the executive *must* be single (Art. IV), for otherwise there might be, in case of domestic violence, the same difficulty in convening them, as

the Constitution intends to provide against in regard to the legislature. The Constitution provides the State judges shall be *bound* by the Constitution and laws of the United States."

Texas v. White, 7 Wall. 700.

Judson Taxation, §§ 311-316.

I Curtis Constitutional History U. S., pp. 427, 611-613.

II Tucker Const. U. S., §§ 310-312.

II Bancroft's Hist. Const. U. S., pp. 327-328.

II Wilson's Works (Phila. 1804 Ed.) pp. 209, 407, *et seq.*

Dillon Laws Juries, Eng. & Am., p. 32.

II Thorp Const. Hist. U. S., p. 464.

McClain Const. Law U. S., § 174.

"The Constitution and the laws of the United States, is declared to be the SUPREME LAW of the land, and the judges of every State are to be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

The phrase, "facts from which it CAN be inferred", is pretty flexible language upon which to base a grant of an extraordinary power which all courts unite in conceding must be strictly construed, —"the *mode* of exercise of which constitutes the *measure* of power granted," in a statutory summary procedure *in invitum* by which the citizen may be deprived of his property.

What "CAN be inferred," it must be admitted, depends principally upon the imagination and desires of the inferer. It does not depend upon rule. It is governed by uncertainty instead of by certainty. It is governed by uncertain unrestricted vascillating inference instead of by positive law.

It either can or cannot (as desired) be inferred (or not inferred as desired) from known recent naval movements that this country (either) has (or has not, as desired), declared war against Japan.

With all due deference, I most respectfully submit it either *can* or *cannot* (as desired) *be inferred* or *not inferred* (as desired) from the alleged ordinance recital in the case at bar that the law either had not or had, (as desired) been complied with. It *may* have been, or it may not have been.

Infer or *conjecture* as one may, there is nothing on which to base any inference whatever, (1) that the alleged *finding* in the void ordinance was itself a valid and not a void finding; (2) that jurisdiction existed; (3) that the law had been *fully* complied with.

The possibilities of *inference*, as used in the case at bar are, indeed, truly "*immense*," i. e., unlimited except by the desires of the inferer.

The violence which the inference the court drew in this case does to the actual facts, and the necessarily *conjectural*, if not indeed purely *speculative*, character of any inference at all in the premises, I most respectfully submit, indicates the court used the word INFERRED in its most flexible possible sense.

But the question under this point No. "III" of my argument is, does the phrase "due process of law" as used in the 14th Amendment *itself* inhibit

legislation by other than the legislative department of the government? Does it prohibit pure and simple legislation by State courts? I contend it does. If this court says it does, that is as far as we need go in this case.

In the early case of Osborn v. Bank, 9 Wheat. 865, this court, speaking through the great Chief Justice Marshall, said:

> "Judicial power as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law and can *will* nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion in discerning the course prescribed by law; and when that is discerned, it is the duty of the court to follow it. Judicial power is never (properly) exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

The above is cited with approval in

In re Burris, 136 U. S. 610.

By this court, speaking through Mr. Justice Baldwin, in Decatur v. Paulding, 14 Peters, 604:

> "We have nothing to do but to expound the law as we find it; the defects of the system must be remedied by another department of the government * * *. The argument of inconvenience has been pressed upon us with great earnestness. But where the law is clear, this

argument is of no avail; and it will probably be found that there are also serious inconveniences on the other side."

In Luther v. Borden, 7 Howard, 41, this court, speaking through Chief Justice Taney, said:

"It is the province of a court to expound the law, not to make it."

And again, on page 45 in the same case:

"The courts must administer the law as they find it."

In Kilbourn v. Thompson, 103 U. S. 182, this court, speaking through Mr. Justice Miller, said:

"It (the U. S. Constitution) contains in the provision that 'no person shall be deprived of life, liberty or property without due process of law,' the strongest implication against punishment by order of the legislative body. It has been repeatedly decided by this court, and by others of the highest authority, that this means a trial in which the rights of the party shall be decided by a tribunal appointed by law, which tribunal is to be governed by *rules previously established*."

In Hurtado v. State, 110 U. S. 516, Mr. Justice Matthews, speaking for this court, said:

"Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not *law*, whether manifested as the decree of a personal monarch or of an impersonal multitude."

In Dixon v. Field, 111 U. S. 83, 92,—quoted from in Sauer v. Town, 20 Colo. App. 365),—this court said concerning recitals in bonds:

> "Of course this does not extend to or cover matters of law. All parties are equally bound to know the law; and a certificate reciting the actual facts and that the bonds were conformable to the law, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law. Otherwise it would always be in the power of a municipal body, (I add, or a court), *to which power was denied*, to usurp the forbidden authority by declaring that its assumption was within the law. * * * And the estoppel does not arise, except upon matters of fact, which the corporate authority had *authority by law* to determine and to certify."

Certainly no authority *to legislate* was by Constitution, statute or other *law* conferred on the State court.

In Hagar v. Reclamation District, 119 U. S. 701, Mr. Justice Field, for the entire court, said:

> "That clause of the 14th Amendment is found, in almost identical language, in the several State Constitutions, and is intended as an additional security against the *arbitrary* deprivation of life and liberty and the *arbitrary* spoliation of property. Neither can be taken without due process of law. What constitutes that process it may be difficult to define with precision so as to cover all cases * * *. It is

sufficient to observe here, that by 'due process of law' is meant one which, following the forms of *law*, is appropriate to the case, and just to the parties affected. It must be pursued in the ordinary forms of law; (is legislating by courts and applying that legislation to the particular case the same instant the *ordinary* form?); it must be adapted to the end to be attained; and whenever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivatiod of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In Yick Wo v. Hopkins, 118 U. S. 369, this court, speaking through Mr. Jsutice Matthews, said:

"The 14th Amendment to the Constitution is not confined to the protection of citizens. * * * When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. * * * The law is the definition and limitation of power. * * * The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments

showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the commonwealth 'may be a government of *laws* and not of men.' For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails."

Further on in the opinion, in commenting upon a Baltimore ordinance under which a carpenter had used a steam-engine in his business under a permit from the mayor and council, providing same "to be removed after 6 months notice to that effect from the mayor," the learned court says:

"It commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam engine in the prosecution of any business in the city, to cease to do so. * * * If he should not chose to do this, but only to act in particular cases, there is nothing in the ordinance to *guide* or control his action. It lays down no *rules* by which its *impartial execution* can be secured or partiality and oppression prevented. * * * In fact, an ordinance which clothes a single individual with such power hardly falls within the *domain of law*, and we are constrained to pronounce it inoperative and void."

"This conclusion, and the reasoning on which

it is based, are deductions from the face of the ordinance (the same is certainly true of the face of that law *made* by the State court and shown from the face of the opinion in the case at bar), as to its necessary tendency and ultimate actual operation. * * * (Even) though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the (Federal) Constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; *Ex parte* Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703."

The foregoing case has, within the past few months, been applied and followed by the State cour in the case of City v. Heath (Colo.), 88 Pac. 459, in which the able present Chief Justice Steele for the court, after quoting from the foregoing and other opinions, said:

> "An ordinance requiring one peddling water to have a license, and giving the city council power to arbitrarily refuse a license, is void as discriminating in the right to follow a lawful calling."

Walsh v. Denver, 11 Colo. App. 523.

Platte Canal v. Lee, 2 Colo. App. 184.
Wilbur v. Maynard, 6 Colo., op. 488.

In Scott v. McNeal, 154 U. S. 45, Mr. Justice Gray, speaking for the court, held:

"The 14th Amendment * * * after other provisions which do not touch this case, ordains, 'nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. And the first one, as said by Chief Justice Waite, in U. S. v. Cruickshank, 92 U. S. 554, repeating the words of Mr. Justice Johnson, * * * was intended 'to secure the individual from the *arbitrary* exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'

"Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment

upon it has not been given due faith and credit in the courts of another State. In every such case, this court must decide for itself the true construction of the statute. * * * The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence.' * * * Pennoyer v. Neef, 95 U. S. 714, 733."

This court, speaking through Mr. Justice Harlan in San Diego Co. v. National City, 174 U. S. 740, 750, after stating that courts should not perform the legislative function of rate-making, said:

"The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. * * * This court has held that the fixing of water rates is a *legislative* act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling *judicial* action."

See, also, Rolle v. Holly, 176 U. S. 398.

Cotting v. Stock Yards, 183 U. S. 100.

See, also, cases cited, pp. 38 to 40 hereof.

The case of School of Healing v. McAnnulty, 187 U. S. 94, involved the question of the right of the Postmaster General to arbitrarily stop mail, after

affording a hearing. This court, speaking through Mr. Justice Peckham, said:

> "Unless the question may be reduced to one of fact as distinguished from mere opinion, we think these statutes cannot be invoked for the purpose of stopping the delivery of mail matter. (P. 106.) * * * That the complainants had a hearing before the Postmaster General, and that his decision was made after such hearing, cannot affect the case. (P. 107.) * * *. Has Congress entrusted the administration of these statutes wholly to the *discretion* of the Postmaster General? * * * The acts of all its officers must be justified by some *law*, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." (P. 108.)

It might appropriately be asked in this connection, *could* the State Constitution, without a violation of the Federal Constitution and particularly the 14th Amendment thereof, entrust the administration of of justice and the control of property rights of citizens wholly to the arbitrary *discretion*, conjecture, guess or *inference* of the State court, any more than could Congress entrust such a power to the Postmaster General?

Our State court has expressly held in French v. Deane, 19 Colo. 504, that "The law as construed by this court is as well protected by constitutional inhibitions as if the decisions had been enacted into statutes." In other words, that its legislation has the same force as that of the General Assembly.

What sort of a precedent does the case at bar in permitting court legislation by inference, and inference founded on pure conjecture, establish to be followed and cited as authority for confiscatory takings of life and liberty, to say nothing of private property, by a court such as, sometime through our system of an elective judiciary, the State not only may, but as the present court in the People v. Tool, 35 Colo. 225, 231 *et seq.*, and other cases considered about the same time intimates it was, so unfortunate as to have thrust upon it?

The possibilities of inference are, as I said before, truly *immense*. With similar conjecture as to such a not impossible future state of affairs, they are in addition, indeed nothing short of *terrible*.

As Judson on Taxation, p. 362 (quoting the language of Mr. Justice Field), says:

> "The 14th Amendment is aimed against the perpetration of *injustice*, and the exercise of *arbitrary* power to that end."

I contend the due process of law clause of the Federal Constitution contains an express prohibition against court legislation pure and simple.

But whether it does or not, I think I have shown,—

IV.

That the re-constructed proviso was beyond the power of the State, even through its proper channels, to enact because ITSELF in direct violation of one or both of the above quoted clauses of the 14th Amendment.

In Brown v. City, 7 Colo. 305, our State Supreme Court said:

> "The constitutionality of a law is to be tested, not by what *has been* done under it, but by what it authorizes to be done by virtue of its provisions."

I but quote from cases already cited when I repeat:

> "In determining whether a statute is unconstitutional, the question is not whether the result is harmful in the particular case, but whether the statute according to its terms, will violate the provisions of the constitution in its application to cases which may be expected to arise."
>
> "The constitution guards against the *chances of infringement*."

It is much easier to state just what is *not* to be *inferred* (justice), than it is to enumerate what *is* to be anticipated from the exercise by a *subordinate* Denver City councils or even by a State Supreme Court, of unbridled *arbitrary* power.

This case at bar furnishes an example of a good

start in the direction of improving(?) private property to such a remarkable extent it ceases to be an asset.

V.

Said proviso as so reconstructed was in violation of one or both of said clauses of the 14th Amendment CONSTRUED BY THE COURT AS AUTHORIZING an ex parte AMBIGUOUS recital in a VOID ordinance of an AMBIGUOUS finding without investigation, notice or opportunity to defend, of AMBIGUOUS facts from which (if as the court insists any inference is to be indulged in) it either CAN or CANNOT equally as desired, be inferred that the law either HAS or HAS NOT (as desired) in part been complied with,—which recital as the court construes said proviso as construed may be contradictory of itself and contradicted by other equally conclusive recitals in the same record or in other record portions of the same statutory proceeding showing a total want of jurisdiction and failure of compliance with the law,—to be when made CONCLUSIVE on adversary property owners of its OWN validity, of JURISDICTION, and of FULL compliance with the law.

The statements contained in the above heading do seem unreasonable. But, I submit in all seriousness, they are but a *fair* statement of the real action and process of reasoning of the State Supreme Court in conclusively-concluding-plaintiffs from showing their property was taken without due process of law.

I think this court will come to the same conclu-

sion after it has read all those portions of this argument which precede it, and has compared the above statement with the record and with the State court opinion, in the case at bar.

It is not my intention to over-draw the picture of this case. If anything other than the record and State court opinion is necessary to show I have not over-stated the proposition, it is furnished by the action of the court as shown from the opinions in other improvement cases decided with or immediately after the case at bar. I refer to the Dumars, Campbell and Jackson cases already, in part, analyzed.

I need not here repeat what I have already said concerning the conjectures and legislation the State court found it *necessary* to indulge, in order to uphold those assessments. I would, however, request the court to examine my discussion of them as shown on pages 57 to 60 of this brief.

One of my contentions in the Dumars and Jackson cases, (in each of which I was counsel), as well as in the Campbell case in which in a humble way I assisted counsel, was, that the 30 day charter § 34, denied the property owner assessed, or claimed so to have been, access to the courts in violation of the due process of law clauses of the Federal Constitution, and also in violation of § 6 of the Bill of Rights in the Colorado Constitution, which reads:

> "That courts of justice shall be open to every person; * * * and that right and justice shall be administered without sale, denial or delay."

I contended that, in view of the conceded fact

decided in the Richardson case, *supra*, if a property owner paid his assessment he could not recover it back, the § 34 absolutely denied the property owner assessed any right to resort to the courts, and informed him beforehand any effort to obtain relief from the courts would be useless.

And, independent of the doctrine announced in the Richardson case, I further contended that the effect of the charter § 34 was to compel the prospective plaintiff *before* he could have any standing in court, to pay his opponent (the city) the alleged assessment, which even if void he could not get back.

I quote, beginning on page 16, from my argument in the Dumars case, as follows:

> "But counsel, while impliedly admitting the § 34 cannot stand as it is written, contend that it is not to be literally and naturally construed and that this court shall assume the functions of the legislature and by addition to or subtraction from its language transform it into a code of procedure for the guidance of the burdened property owner; that it shall be construed to enact that the assessment shall be paid within thirty days and then a common law action instituted to recover it back. This in the face, not only of the fact that the U. S. Supreme Court and the courts of many States have held such a law unconstitutional, even when couched in appropriate words, *but also in the absence of any language whatsoever in the act* which in the least indicates any such intention on the part of the legislature. We have diligently sought out its provisions, yea we have torn it assunder, assembled and dissem-

bled its many parts of speech by all the rules of grammar, syntax, rhetoric and logic to discover word, sound or syllable which intimated even in the slightest any intent that the property owner after paying the assessment is granted the right to sue and recover the same, if illegal, or of any rule that he should be compelled to follow such a course. It might be instructive for counsel to re-draft the act so as to embody in common English the provisions claimed by its construction, and then compare with the original the result of his handiwork. The variest child would exclaim at its mutilation and expansion.

But merely for the sake of argument, let us for the time being concede that the clear intent of the statute is that parties assessed shall pay the whole of the assessment to the defedants and then sue to recover the same, and ascertain what the result of such a construction would be and the effect of its practical operation. The prospective plaintiff is compelled, *before he has any standing in court*, to pay to the opposing party the entire amount by him *claimed* to be due, to be held and enjoyed by the said defendant until the final determination of the action. Without adverting to the hardships this might naturally impose upon the servient party, and the possibilities of financial insolvency of defendant, delay, loss or misappropriation, it is to be noticed that plaintiff is denied the use, enjoyment and increment of his money during the entire pendency of the action, no matter how frivolous or void may be the claim of the defendant. That this amounts not only to a "delay" but to an absolute *denial*

and *purchase* of justice in violation of Section 6 of the Bill of Rights needs only to be asserted to be unassailably established. Can it be said that under such circumstances the property owner is not parting with something of value for the privilege of maintaining an action in the courts to which this section of the Bill of Rights guarantees free access and speedy justice without sale or denial? That all courts have uniformly held this to be a violation of our fundamental law, we cite:

Weller v. St. Paul, 5 Minn. 95.
Morrison v. Same, 5 Minn. 108.
Baker v. Kelly, 11 Minn. 480.
Bennet v. Davis, 90 Me. 102, 105.
Dunn v. Snell, 74 Me., op. 27.
Wilson v. McKenna, 52 Ill. 44, op. 48.
Reed v. Tyler, 56 Ill. 288.
Boals v. Boekenan (Ill.), 66 N. E. 336.
Groesbeck v. Seeley, 13 Mich. 329, 342-4.
Hart v. Hendeson, 17 Mich. 218, 221-2.
Silsbee v. Stockel, 44 Mich. 562, 570.
Lassiter v. Lee, 68 Ala. 287, op. 299.
Eustis v. Henrietta, 90 Tex., op. 474.
Green v. Briggs, 1 Curtis, 311, op. 325.
West v. Cameron, 39 Kas., op. 738.
Burke v. Brown, 148 Mo., op. 315-20.
Gilman v. Tucker, 128 N. Y. 190.
Armstrong v. Ogden, 168 U. S. 240.

See, also—Davidson v. Jennings, 27 Colo. 187.

"The case of Weller v. St. Paul, *supra*, is exactly in point. The action was a bill in equity by the property owner to restrain the issuance of a tax deed under a sale for a special assessment for paving the street abutting Weller's property and to have the tax certificate declared void. The city demurred to the complaint. The charter provided that 'no person shall be permitted to institute a proceeding to set aside any assessment or special tax hereafter levied or assessed upon any lot or tract of land * * * unless such person shall first pay or tender to the proper party, or deposit for his use with the Treasurer, the amount of all unpaid taxes thereon, together with interest and charges. The city claimed that as this payment or tender was not made it was a bar to the action. The court, on page 75 of their opinion, say:

"'I do not think that this provision is consistent with Section 8, Art. 1 of the Constitution. It is therein provided that every person "ought to obtain justice freely and without purchase." *The effect of the provision of the City Charter above cited is to compel the party aggrieved to purchase a right to a status in court, by paying the debt which the defendant claims as its due.* * * * The legislature may, doubtless, pass laws providing for giving security for costs by suitors, but this does not appear to be either the effect or intent of this provision. * * * I can conceive of no other object of this provision than to make it more onerous and difficult for persons to contest the validity of city assessments, a difficulty which, perhaps, in

many cases might result in an entire denial of justice. This object is unconscionable and unjust, and inconsistent with the provisions of the Constitution. This ground of demurrer is therefore not well taken.' ''

I then quoted similarly at length from the other cases cited. A little further on in the same brief I said:

''Counsel in their attempt to transform § 34 into a statute of limitations are too wise to claim that it can stand as a limitation statute without this court legislating into it three words, so as to make it read pay '*or bring suit*' within the thirty days. He says, 'Had plaintiffs brought their action within thirty days *all* the defects urged in the complaint might have been considered.' This § 34 as it stands contains not one word about limitations of actions,—does not in fact contemplate the *possibility* of suit within thirty days or at any other time. What it does require is *payment*,—not suit. Just where could possibly be obtained the right to legislate the words 'or bring suit' within the thirty days into this section we are as entirely unaided by counsel as by any rules of construction to be found in the books. The later § 62 is just as clearly and plainly a limitation section as this § 34 as it stands is not. Had the legislature so drafted the section as to have included the words and made it read that in order to prevent an involuntary election to pay (in installments) the property owner must pay 'or bring suit' within the thirty days, absolutely nothing would have been

left to which the later (limitation) § 62 could possibly apply. It would have left § 62 utterly meaningless and clearly surplusage,—indeed actually *misleading* as well,—for it would still (as it in fact does) state that the property owner brought his action in time if within ninety days.

"But, just for argument's sake for the time being, concede these contentions of counsel that the re-enactment of § 34 impliedly repealed § 62. The words 'or bring suit' must still be added in order to transform the section into a limitation statute. For the mere sake of argument and for the time being only, add them. Do all he asks. Do even more. Concede it would apply to this kind of an action to remove a cloud. Is he any better off in this case? Has he so framed his pleadings as to raise the question of the statute of limitations as a bar to this action? Not a bit of it. The plea of the statute of limitations as recognized by this and every other court, is a mere *personal privilege* to be taken advantage of or waived as a defendant sees fit. If he does not raise it at the earliest possible moment, and continue to urge and rely upon it, *he waives the privilege*. It is what is termed a strict, or technical, as some courts have termed it, an unconscionable defense. To be of avail it must be plead *specially*. It cannot be raised under a *general* demurrer. It can only be raised by *special* plea. He must plead the fact, *as a fact*, that suit was not begun within the statutory period. Has he done so? No. * * *.

"'It is asserted that our six years statute of limitations had run against the note here sued on. * * * *This statute is a personal privilege, to be relied on or not, as the defendant may choose.* There is no legal presumption that he will elect to plead it.'

Cross v. Moffat, 11 Colo., op. 212.
Williams v. Cole, 4 Colo. App. 368.
Buckingham v. Orr, 6 Colo. 590.

"'The defense of the statute of limitations is in the nature of a special *privilege*, and, if not *specially* pleaded, *must be treated as waived.* It cannot be considered for the first time in this court. *Nor can it be considered under the general objection that the complaint does not state facts sufficient to constitute a cause of action.*'

Jennings v. Rickard, 10 Colo. 395.
Chivington v. Colo. App., 9 Colo. 597.
Polk v. Butterfield, 9 Colo., op. 327.
Hunt v. Hayt, 10 Colo. 278.
Hexter v. Clifford, 5 Colo. 168, op. 173.

"'The statute of limitations being a *strict* defense, if a party omit to plead it the court will not allow him to amend by adding that plea.'"

Owers v. Olathe Co., 6 Colo. App. 1, op. 7-9.
Wood v. Chapman, 24 Colo. 134, op. 135-6.
Curtis v. Pueblo, 11 Colo. App. 446.
McCloskey v. Mills, 32 Colo. 274.
13 Ency. P. & P., 184.

Indeed, so strictly do the courts hold to this doctrine that advantage must be taken of this defense, if at all, at the very *first* opportunity, it has been held in cases cited with approval by this court on this point, that an enlargement of the time to plead does not enlarge the time to file a plea setting up the statute of limitations.

Nelson v. Bond, 1 Gill (Md.) 218.
Johnson v. Green, 4 Gill & J. (Md.) 381.
Speer v. Griffin, 23 Md. 418.
Wood Limitations, § 7.

> "No defense of the statute of any limitations has ever been raised either by demurrer or answer."

While the court decided the Dumars case on the same ground as the case at bar,—(as I have shown on pages 57 to 60 of this argument),—it *legislated* the three words "or bring suit" as requested by counsel in the Campbell case the property owners' briefs which contained the language *(in haec verba* or in substance) as I have above quoted it from my argument in the Dumars case.

In the Jackson case I made the same points, and in analyzing said § 34 used the following language beginning on page 10 of my brief:

> "In other words, 'to assent' or 'to elect,' requires and includes not only an intent *to do* something, but the *doing* of it. It means *action*, not mere negative inaction.
>
> "The complaint in this case clearly alleges that the plaintiff property owners protested and

objected *at each and every stage of the proceedings* to the power and jurisdiction of the city to create this alleged improvement district and construct these alleged improvements at their expense,—a strange character of evidence from which to draw a rule of *conclusive* evidence creating a conclusive presumption that they did not *intend* to do what they did do, but were all along *intending* (electing) to pay this attempt at highway robbery (mistermed an assessment) in installments merely because they *failed to pay* it in full within 30 days.

"The truth is, *a failure to pay* an alleged assessment in full within 30 days of its publication or any other time bears no relation whatever and is and cannot be alone and of itself any evidence whatever, either in favor of, or against, an *intention* or election to pay in installments.

"A person assessed *must* of necessity and in the very nature of things, voluntarily or involuntarily, with or without intention, arrive at either one of two absolutely inconsistent results, —results at any rate the *failure to arrive at* which is and can be no evidence whatever of an intention to *affirmatively do* the contrary.

"He must, whether he intends or no, by action or inaction, arrive at one of the two results, he must *pay* or *fail to pay*.

"The first *(to pay)*, assumes intention; the second *(not to pay)*, does not.

"In doing the one *(to pay)*, he is a free agent; to accomplish the other *(failure to pay)*, he is not of necessity a free agent at all. He may or may not have knowledge or intent.

"An *intention* to do a thing can never arise from a *lack of intent* to do it.

"To do is affirmative. Merely to *fail to do* is not necessarily affirmative, it may be nothing whatever. A result arising without intent or knowledge.

"An 'election' is but an 'intent,'—it implies 'intent,' i. e., *affirmative* action with *knowledge* an *intent* to do what is done.

"An 'election' can by no possibility ever arise from a mere *negative* without intent or knowledge.

"'Statutes which undertake to make proof of certain facts absolute or *conclusive* evidence of guilt are unconstitutional.'

Voght v. State, 124 Ind. 358, op. 362.

"Even for a fact to be *prima facie* (to say nothing of *conclusive* evidence of another fact), it is essential 'that the facts upon which the statute raises the presumption have some fair relation to, or natural connection with, the fact presumed.' (Citing cases cited elsewhere in this argument.)

"Clearly the section cannot bind those which it expressly in words includes who are *insane* under disability or otherwise, and this court has repeatedly declared. 'A valid assessment cannot be made under an invalid ordinance (law), and its constitutionality is to be tested, not by what *has* been done under it, but by what it *authorizes* to be done by virtue of its provisions.' (Citing cases) * * *.

"An *insane* man *assessed* is and can be under no greater disability, under the language of the section itself, or more *helpless* to prevent its operation, than the plaintiffs or any other property owner assessed who does not intend to elect to pay, but to *not* pay, i. e., contest.

"But the real point here is that the section attempts to make the mere *failure to do a thing* (which *failure to do* is entirely consistent with an intention or election *not to do it at all) conclusive* evidence of an intention and election *to do it.* * * *

"Another point: This § 34 violates the well known principle of all evidence that,

"'A presumption must be based *upon a fact* and not upon inference or *upon another presumption.*' (Citing cases referred to elsewhere in this argument.)

"It is to be noted this section first makes a presumption of an election *to pay in installments* arise from a mere *failure to pay in full* and then declares,

"(2) 'All persons so electing to pay in installments shall be conclusively considered and held as *consenting* to said improvements; (3) and such consent shall be conclusively held and considered as a *waiver* of any and all right to question the power or jurisdiction of the city, (4) to construct the improvements, (5) the quality of the work, (6) the regularity of sufficiency of the proceedings, (7) or the validity or correctness of the assessment.'

"When one comes to consider the other sections of the charter and the facts of this case

as shown from this record, that the assessing ordinance socalled was published March 21st, 1902, and that by the provisions of charter § 39, referring to the general law, the city was not authorized to and *could not within the 30 day period*, or until the lapse of several months, resort to any process whatever to enforce payment of the assessment, the absurdity of the section becomes really farsical. For any payment made either within the 30 days or at any subsequent time before the city could resort to the only process authorized to enforce payment, —i. e., advertising by the county treasurer of the property at tax sale the following fall,— would be a *voluntary* payment (if made *within the 30 days* made also *before due*).

"To declare, as does this § 34, that a mere *failure to pay* shall be conclusive evidence of an election *to pay* (in installments) would be very much like declaring the failure under any and all circumstances of a person to be within ten miles or other given distance of where a murder was committed *conclusive* evidence (to raise an irrebuttable *conclusive* presumption) he connived at and was a party to the murder. (Citing cases.)

"There is *just* as much reason and sense in the one *presumption* as in the other.

"Or, to use for illustration a condition of facts which this court has repeatedly passed on, a statute of this State declared the mere fact that an animal was run over by a train *conclusive* evidence that the railroad company was negligent.

"This court repeatedly and very properly

held that statute void and the killing by a railroad of live stock not even *prima facie*,—(to say nothing of *conclusive*),—evidence of negligence on the part of the company. (Citing cases.)

"If that statute declaring a rule of evidence is unconstitutional, this § 34 declaring a similar rule of *conclusive* evidence certainly must be.

"The right to the defense of contributory negligence of plaintiffs is not secured to defendants, be they railroads or individuals, by reason of any *constitutional* provision any more than is the right of a property owner assessed to rely on the defense of a failure to comply with the only statute authorizing a making of an assessment, yet this court very properly and in what might many of them be aptly termed *masterly* opinions in the cases above and many others which might be cited, not once merely but repeatedly has declared that no legislative enactment could deprive defendants of the right to the defense. As well said in the Bullis case, *supra*, 'Presumption cannot take the place of legal proof.'

"The argument is a great deal stronger in favor of the power of the legislature to deprive a corporation (which is a mere *creature* of the legislature, not protected by the privileges and immunities clauses of constitutions), of the statutory defense of contributory negligence and make it liable absolutely *(conclusively)* for all injury of whatsoever character committed under any and all circumstances by it, than there can possibly exist for depriving a *citizen* (who is protected by all the clauses of the 14th Amendment of the Federal Constitution and by the

several provisions of State Constitution as well of a *statutory* defense. Or, to put it a little stronger, of a defense based on a failure of the statutory creature in attempted action against an adversary, to comply with the provisions of a legislative act without the existence of which statute said city or railroad would have no right, power or authority whatever to do the act attempted, as against the citizen or anybody else, or to act at all, or even exist.

"The truth is, the legislature does not possess curative power where there is an *adversary* party. It cannot *as against the adversary* property owner sought to be charged in favor of itself or its creature by its mere *fiat* cure proceedings it has *conditionally* authorized the city to take against the citizen. And this is especially true where the conditions precedent to the exercise of the conditionally granted power is a condition which only the adversary can bring into existence. To do so is to take the property of the citizen without due process of law and by *mere legislative fiat*. It cannot under our constitution by mere *fiat* deprive the citizen of the *right* to the defense of lack of compliance with the statutory provisions and safeguards for his protection set about and conditional to the exercise of any power by the city at all, of subjecting his property to the lien or charge." (Citing cases.)

In Lambert v. Shumway, 36 Colo. 350, 353, this court said:

"Unless an affidavit of publication of a notice of a tax-sale shows (affirmatively and not

merely by *inference* however strong) that copies of each number of the paper in which the notice was published were delivered by carrier or transmitted by mail to each subscriber of the paper, according to the custom and mode of business in the office, it is insufficient and a sale based thereon is invalid. Rustin v. Co., 23 Colo. 351; Thomas v. Bank, 17 Colo. 235."

In the Rustin and Morris cases, *supra*, this court said:

"Facts which should be of record cannot be proved by parol."

"I need but add in response to the statement of the writer of the opinions in the Campbell case and the Londoner case to the effect in substance that a court is justified in *altering*, *adding to* or *subtracting from*, clear and unambiguous language given to a statute by the legislature if by so doing the statute can be upheld as constitutional where it would otherwise have to be held to be in violation of the constitution, that *if such is the law* this court and every other court in the land has repeatedly and grievously erred in every decision declaring any legislative enactment in violation of any provision of the SUPREME constitutional law of the land. If the rule announced in the Campbell and Londoner cases is the correct one, these several courts should not have declared the several statutes under consideration in any case ever considered unconstitutional,—they should have simply *reframed* the statute. In other words, done the

same as this court did with this § 34 in the Campbell case, and as this court did with proviso "Eighth" in the Londoner and Dumars cases. * * *

"As concededly, *but for this § 34*, this assessment was subject to the attack made upon it by this complaint, and as the plaintiffs are *in possession*, brings this case squarely within the reasoning of the well-known case of Grozbeck v. Seeley, 13 Mich. 330 (citing cases). * * *

"So, without attempting to repeat the allegations of the complaint, all of which prior to the judgment in the case at bar, the plaintiffs stood ready and offered, but were denied leave, to prove (and which allegations must, therefore, in the consideration of this cause in this court, be considered the same as though proven as alleged), and without attempting to unnecessarily re-hash in this brief what is said in the prior ones, I will refer the court more particularly to the folios of this abstract at which some of the allegations of *actual* fraud and conspiracy and gross abuse of discretion amounting to *legal* fraud under the decisions of this court appear, to-wit (referring to folios).

"The complaint alleges the plaintiffs' property of insignificant value as compared with the amount of the assessment. Amount of assessments are shown. Alleges that none of the city authorities ever in any manner considered the question of benefits. That each of the plaintiffs duly filed complaints and objections to the apportionment; that an assessing ordinance was passed and vetoed by Mayor Wright. That by

reason of the unskillful manner in which the work was done it was by the city ordered taken up and relaid; that this was never done. Nevertheless a new 'notice of proposed assessment' was published, to which each plaintiff duly filed proper written objections. These were without hearing 'arbitrarily and without any attempt at determination of benefits' overruled. That by the alleged assessment plaintiffs' properties are attempted to be confiscated. That there is nothing due or owing from any of plaintiffs or any of their properties on account of said alleged improvements. That the only action had was as shown by complaint.

"In view of these allegations of fraud, grave abuse of discretion, etc., and lack of consideration of benefits, I think this case comes clearly under the decision in Denver v. Kennedy, 33 Colo. 81, 88, where this court said:

"'the action of the city authorities in determining such questions (of benefits) is conclusive *unless it clearly appears that their action was fraudulent or unreasonable.*' * *

"The court, in the Campbell case, notwithstanding the provisions of the section in that particular regard, were as free from ambiguity as any legislative enactment well could be, *legislated* into it the words 'or bring suit' within 30 days.

"I think the following, among many other decisions by this and other courts, clearly sustains my contention that it is *only* where the language of the legislature is *ambiguous* and open to two or more *different* constructions that

a court is justified in resorting to rules of construction or interpretation at all and then *only respecting the ambiguous portions.* (Citing cases.)
* * *

"'Courts are not at liberty to *speculate* upon any actual intention of the legislature. A legislative intention not expressed in the words actually *used* has no legal existence.'

Lee v. Cram, 63 Conn. 434, 438.

I Lewis' Southerland Stat. Const. (2nd Ed.), § 229.

"The section as 'it is writ' is, as the Campbell case intimates, concededly and unquestionably in violation of the Constitution. If read as it is written, it is also absolutely free from ambiguity except, possibly, as to the meaning of, and what is covered by, the words 'All special assessment' being the subject matter of and at the beginning of the § 34.

"The meaning of these three words, or rather the last two of them, is doubtless open to construction, and in view of the fact that it is only by virtue of the charter provisions contained in this article 7 that the city is granted or possesses *any* power to make any 'special assessment' at all,—that any *attempted* special assessment made (as in the case at bar) in violation of that article 7 would, in fact, not be a special assessment at all, but simply an *attempt* at special assessment (Gomer v. Chaffee, 6 Colo. 314, op. 317), as well also in view of the fact that elsewhere in the charter, article 7, the language of the legislature in speaking of 'special

assessments' is followed by, and coupled with, the words '*made in pursuance of this article*,' as notably in § 32, where it is only 'all special assessments *made in pursuance of this article*,' that are declared *liens* on property, it seems to me that the § 34 must be read as meaning 'All special assessments *made in pursuance of this article*,' meaning, of course, all *valid* special assessments.

"The correctness of my contention in this regard is emphasized by § 303 of the 1904 charter, framed under the Rush Bill (being the section taking the place of said § 34), in which the language is nearly identical with said § 34, except the words 'all assessments;' at the beginning of the section, is immediately followed by the words '*made in pursuance of this article.*'

"In accordance with the above contention, it was held in the recent paving case of Batty v. City, 63 Neb. 26, op. 30, that the word 'incumbrance,' in a conveyance of property subject to an alleged paving 'assessment,' meant a *valid* incumbrance caused by a *valid* assessment. (Citing many cases.) * * *

"So construed, omitting the words '*or bring suit*,' by the court in the Campbell case *legislated* into it, it would probably be constitutional, (except, of course, it is still *special* legislation), and in so reading it I think the plain meaning of the legislature is arrived at, and what is of vastly more consequence, this court thus keeps within its legitimate and plainly granted functions of a *judicial* body and does not have to usurp and perform legislative pow-

ers, the sole right to exercise which is by the constitution delegated to the General Assembly and prohibited to the courts. (Constitution, Art. III.) * *

"Had this petition been followed, as the complaint alleges lots in Blocks 19, 21, 25 and 27, Arlington Heights, would have been in the district and assessed for their portion of the cost.

"But instead of proceeding in accordance or pursuance of the petition, the advertisement and subsequent proceedings cuts the last mentioned lots out of the district petitioned for (the complaint alleges because their owners would not petition for the alleged improvements) and only makes the assessment district include (besides Grant and Logan avenues between 6th and 8th), 'that part of 7th avenue 125 feet west of the west line of Grant avenue to a point 125 feet east of the east line of Logan avenue.'

"In addition, nothing is said in the petition about a sewer and drainage facilities or sandstone gutter flagging, but it is shown from the advertisement these were included.

"The streets were narrowed from 90 feet wide to 30 feet wide, though the petition was signed on the theory they would be left the same width as before. And the grades were thereafter materially changed.

"This all appears from the *face* of the proceedings in the alleged district, rendering said proceedings, (independent of the statute declaring them *prima facie* valid), *void* on their face.

"It is requisite that the proceedings show *affirmatively upon their face* a compliance with all the conditions made necessary by the statute to a valid exercise of the taxing power, and the omission of necessary facts in the record will not be supplied by

presumption." (Citing same cases as in brief at bar.) * * *.

"In addition to this the complaint alleges the improvements (?) constructed were not of the materials or character petitioned for in the minority and only petition presented; or authorized by the creating ordinance,—and instead of being a *macadam* pavement made of stone obtained from the designated quarries, it was a conglomerated mass of huge chunks of rotten stone and slag dumped (not mixed) in with sand, mud and dirt. * * *

"It is said in the Campbell case (33 Colo., op. 167):

> "'The two sections under consideration (34 and 62 of Article 7) are necessary *statutes of limitation*, or part of § 34 is meaningless.'

"If so, as the complaint alleges, this § 34, as well as § 62, is in derogation of, and in conflict with, each of the following provisions of the Colorado Constitution:

> 'Art. 5, § 25. "The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say * * * (6) *regulating* the practice in courts of justice; * * * (8) *changing the rules of evidence* in any trial or inquiry; * * * (11) *for limitation of civil actions.*" ' (Citing cases.)

"Also, it is clearly in conflict with the following provisions of the Constitution:

> "'Art. 6, § 28. "All laws relating to courts shall be general and *of uniform operation throughout the State.*" ' (Citing cases.)

"Also with Constitution:

'Art. 5, Sec. 21. "No bill except general appropriation bills shall be passed containing more than one subject, which shall be clearly expressed in its title; but if any subject shall be embraced in any act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed.' (Citing cases.) * * *

'Art. 5, Sec. 24. "No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and re-published at length.' (Citing cases.) * * *

"Going back to the above quotation from page 167 in the opinion of the Campbell case, the court, in that case says, concerning § 34 and § 62:

"'They cannot both stand or be given effect *unless the cases covered by each are different.*'

"The court then attempts to reconcile the two sections, saying:

"'The power or jurisdiction of the city to construct improvements and the validity of special assessments may be raised in one of two ways: (1) That statutory steps have not been observed; and (2) that steps which the Constitution requires have not been taken,'

and proceeds to hold § 34 is a statute of limitations on the *first* only of the above character of contents, and § 64 on the *last* only.

"But that the two sections cannot logically or with the least show of reason, be thus reconciled, appears to me clear from the fact that the language of § 34 expressly covers *both* of the above grounds of contest, plainly saying that a mere failure *to pay* in 30 days shall be conclusively considered 'as a waiver of *any and all* right to question the power or jurisdiction of the city,' etc.

"So, also, does § 62 cover *both* of the above grounds of contest, if it is within the legislative power to make a statute of limitations cover proceedings in violation of the Constitution. But § 62 in *form* at least, is a valid enactment, whereas § 34 is simply a legislative *fiat*, the effect of which is without due process of law to transfer the realty (or, if the alleged assessment is paid, money,) of the party *claimed* to be assessed, to the city authorities making the *claimed* assessment.

"And another conclusive answer to the construction placed upon the section is, the court in its opinion in the Campbell case in *express* terms admits it is in *doubt* as to whether the one given is the *proper* construction.

"Judge Cooley, at page 565 of his great work on Constitutional Limitations (7th Ed.), says:

> "'In the construction of a character, to be in doubt is to be resolved, and *every resolution which springs from doubt is against the corporation.* This is sound doctrine and should be *vigilantly* observed.'

"I further contend, for the reasons stated in my brief in the Dumars case, already referred to, this § 34 is a plain and illy concealed attempt by the leg-

islature to authorize city authorities to take and confiscate the money and property of the unfortunate property owner, by mere legislative *fiat* without due process of law.

"It is difficult enough for the heavily-burdened tax-payer to seek to save his property from such unconstitutional fiats of the *General Assembly*, but when he succeeds, as I think the Campbell opinion concedes we have done by that brief, in showing that *fiat as it is written* violates the fundamental constitutional law of the State, it occurs to me it is hardly fair for this court to itself enter the *legislative* field against him by placing a construction, *retroactive in its effect*, upon the law as construed by the courts of last resort in this State at the time this action was brought and heard in the trial court.

> Dumars v. City, 16 Colo. App. 375.
>
> Keeze v. City, 10 Colo. 112, and cases, *supra*.

> "'The law, as construed by a court of last resort, is as well protected against ex post facto and *retroactive* laws, as if its decisions had been enacted into statutes.'" (French v. Dean, 19 Colo. 504.)

"And this, especially, when the meaning of the legislative enactment itself is, at least in the particulars referred to in the Campbell case, *plain* and *unambiguous* and needs no construction.

"It is, of course, always an unfortunate matter that the legislature should ever enact laws which violate the Constitution. But that they frequently do so we all know. Many of the opinions of this court

declaring legislative enactments in conflict with the Constitution proves the accuracy of this statement. But the Campbell case, *supra*, is about the first decision of a court of last resort I ever met with which in effect declares that solely *therefor* the court is authorized to violate Article III of the 'Supreme law of the land' in order to uphold a plain and unambiguous but *concededly* unconstitutional legislative enactment of the General Assembly.

"While the enactment of legislation by the General Assembly in violation of the Constitution is a thing to be deplored by courts and citizens alike, it is not a wrong beyond remedy.

"But when the courts enter the *legislative* field pure and simple, they not only leave him remediless but themselves violate the plain provisions of the Constitution in so doing. * * *

"But it is the sole province of courts to decide cases and compare laws with the Constitution (the Supreme law). It is the sole province of the *legislature* (not of the courts) to *make* the law and insert the words necessary to render a given enactment constitutional.

"If the courts were authorized to add to, subtract from or substitute for the unambiguous legislative enactment such language as is or may be necessary to prevent its conflicting with the Supreme law of the land, no legislative enactment would be unconstitutional. The usurpation by courts of such a power is attended with the greatest possible danger and strikes at the very fundamental foundation principles on which this government and all republican governments are founded.

"It is no more the functions of the courts to de-

cide questions of legislative *fact* and policy, than it is the function of the legislature to conclusively determine questions of *pure* fact; such a question,—of *pure* fact, is the question of whether or not a majority petition was presented, or whether or not by reason of the lack of such a petition its legislative or administrative proceedings were with or without jurisdiction. * * *

"There is one other point partially touched on I should perhaps call attention to more fully. It is the absolute non-applicability of proviso 8 of § 3 of article 7 of the Charter to this case.

"No finding, or even *attempted* finding, thereunder is shown from the abstract, so, of course, this alone is a conclusive answer to any claim that might hereafter be made of its applicability.

"But there is still another reason, as shown from the decisions of this court, why *even had there been such a finding*, it would not be applicable.

"There was such a finding shown in the abstract in City v. Campbell, *supra*, and the fact that case was not decided on the same grounds and under said proviso 8 as the case of City v. Londoner, 33 Colo. 104, is *significant*, to say the least, as indicating the court did not consider that proviso applicable to that case.

"And it was not applicable, and the court did not consider it applicable to that case for one of the same reasons it would not had there been such a finding in this case, be applicable here. And that reason is that *after* that finding in the Campbell case the plans and specifications were materially altered.

"The ex parte finding or *recital*,—(for such *only* it ever in fact is without hearings or opportunity for

hearings before the body making it),—authorized by said proviso 8th, only concerns the petition and remonstrances and whether or not it was signed by the required number of property owners.

"It does not relate to, and is not even on its face curative of, any of the other preliminary matters such as the preparation, etc., of full plans and specifications by the works board, the alteration of those plans and that petition *after* the passage of the creating ordinance, the questions of special benefits or no benefits, or of fraud and several other matters specifically alleged in the complaint.

"The due performance of these preliminary matters are just as essential and jurisdictional, under the mandatory provisions of the charter, as the presentation of a sufficient petition, and are not covered or *authorized* to be covered by the supposed curative effect of an ex parte recital even in accordance with said proviso 8th.

"This case, therefore, comes clearly within the decision, as shown from the opinion, in the case of City v. Dunning, 33 Colo. 487, 492:

> "'It is no doubt true that conditions precedent, which the law points out shall be observed by the city authorities in ordering improvements, must be complied with, and that, as a general rule, their failure to do so does not give them jurisdiction to proceed.'

"And the Campbell case, after reciting, on page 165 of the opinion, all those alterations and changes in *that* case, happening *after* the enactment of the

creating ordinance containing the ex parte finding or recital, clearly recognizes the non-applicability of that proviso. Had the proviso been considered applicable to that case, it doubtless would have been decided on the same ground,—i. e., under said proviso,—as was the Londoner case, as the two cases were argued together and at identically the same time. The Londoner and other improvement cases argued at the same time were, with the sole exception of the Campbell case, decided at the same time. The Campbell opinion (although the case was argued at the same time and with the others), was not decided until over three months later.

"This, I think, clearly shows the proviso, declared applicable to the Londoner case, was not considered by the court applicable to the Campbell case, and the only reason must have been that many of the material grounds of complaint referred to in the briefs in the Campbell case happened *after* the making of the ex parte recital in the creating ordinance shown from that record. In other words, that the proceedings declared *cured* by that recital were not the proceedings under which the work was done.

"The objections raised in the case at bar happening *after* the enactment of the creating ordinance are much more glaring and material than were those in the Campbell case. To illustrate, it is alleged the petition was fraudulently materially altered *after* the passage of the creating ordinance; the plans and specifications were fraudulently materially altered *after;* that the work done was materially different from that petitioned for or ordered; that the cost of the work materially exceeded the estimate of the

engineer and the contract price therefor; competition stifled; the streets narrowed; and grade altered; the $50 per day liquidated damages for failure to complete the contract within the contract time was never collected or applied on the assessment, or even attempted so to be; extra work was improperly included without authority or advertisement; the payrolls were padded; and all these violations are alleged to have been in pursuance of a fraudulent conspiracy between the works board and contractor, and against the repeated protests of the property owners.

"However, this particular case must be reversed for the further and additional reasons stated in the brief already on file. This so-called statute of limitations was never plead or relied upon in any way in the pleadings of the city, and must, therefore, under the repeated decisions of this court, referred to in my earlier briefs, be treated as waived and abandoned."

I have thus quoted at length from my argument in the Jackson case recently decided, in order to show the absolute *accuracy* of my statement at the head of branch V of this argument.

I think the opinion in this case, taken in connection with the decision of that case, proves conclusively what is stated in *heading V*. I think it proves conclusively the State court used the word "inferred" (in the *legislation* it substituted for the General Assembly's proviso "Eighth") as synonymous with guess, conjecture, speculate, either with, in the absence of, or even contrary to, statute or constitutional provisions.

I think it conclusively shows the State Supreme Court *misconceives* the judicial function and the scope of the inhibition of the 14th Amendment, and conceives they can do in the way of *legislation* what the General Assembly itself could not do.

As this court has in many of its decisions said, it is proper in this case to inquire what are the *elements* of "due process of law" under the 14th Amendment?

Is "due process of *law*" a mere *arbitrary* fiat or *inference* (which *either* can or cannot, as desired, be drawn, with or without *positive* facts on which to base it),—by a General Assembly, or by a court performing its functions; or does it mean what Daniel Webster and the equally great lawyers and statesmen, sitting now and in the past upon this court have always declared it to mean? Is "due process of *law*" a mere "fiat without *law*"? Mere *inferred* power without *law?* A mere *conjecture* or worse?

"By the *law* of the land is most clearly intended the general law (not like that in the case at bar, a special post-facto *made-to-fit* special facts in a *special* case law); a law which *hears before it condemns;* which proceeds upon *inquiry*,—(not upon conjecture and mere *inference)*,—and renders judgment only after trial. The meaning is that every citizen should hold his life, liberty and property under the protection *of the general rules* which govern society. Everyihing that may pass under the *form* of enactments is not, therefore, to be considered the *law* of the land. If this were so, acts of attainder, bills of pains and penalties, *acts of confiscation*, acts reversing judgments, (judgments reversing *unambiguous*

valid legislation), and acts directly transferring one man's estate to another, legislative judgments, (*legislation* by courts), *decrees* and forfeitures in all possible forms, would be the law of the land. Such a *strange* construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature." (Or, by a liberal use of the powerful weapons of *inference*, *conjecture* and *construction*, in courts performing its functions.)

I have gone into this case thus at length in order if possible to cover it in all its phases.

Perhaps most of what is said under heading numbered I is really matter that is too clearly apparent to justify serious argument before this high tribunal. But, whether unnecessarily or not, it is there to be referred to by the court if desired.

I have prepared an index to this long brief, and a complete list of all the authorities, by States, cited that they may be readily collected and examined by the judges.

Judge Dillon, at page 16 of his "Laws and jurisprudence in England and America," has said:

> "*Law* in its nature, is opposed to all that is fitful, capricious, unjust, partial or destructive; and happily legislative enactments (I add, and *court* enactments) of this character will, in general, be found to be in conflict with some one or more of the express provisions of the organic law, and therefore, void."

As Judge Elliott said in Coulehan v. Denver, 20 Colo. 483,—"There may be a wrong way of doing the right thing, but *there is no right* way of doing a wrong thing."

I firmly believe both of the above statements, and with supreme confidence both in the law and in the justice of my contentions, I respectfully submit this case.

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JAN 20 1908

In the Supreme Court of the United States.

October Term, 1907.

No. 157

WOLFE LONDONER, DENNIS SHEEDY,
PLAINTIFFS IN ERROR,

vs.

THE CITY AND COUNTY OF DENVER, AS SUCCESSORS TO THE CITY OF DENVER, A MUNICIPAL CORPORATION, ET AL., DEFENDANTS IN ERROR.

BRIEF OF DEFENDANTS IN ERROR.

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Smith-Brooks Printing Co. Press, Denver.

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THE CITY AND COUNTY OF DENVER, AS SUCCESSORS TO THE CITY OF DENVER, A MUNICIPAL CORPORATION, ET AL., DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This action was originally brought by a number of property owners within Eighth avenue paving district, in the city of Denver, to set aside an assessment made against property in said district, for the cost of paving Eighth avenue therein. The improvement was made in the years 1898 and 1899, under the charter of the city of Denver, which charter had been enacted by the legislature of the state of Colorado in 1893, and amendatory acts thereto passed in 1895 and 1897. Of the numerous plaintiffs in the state courts only two appear in this court, all the

rest having elected to abide by the decision of the Supreme Court of Colorado and pay their assessments. The regular procedure outlined in such charter for such improvements was carried out by the board of public works and city council as follows, proviso third, section 3, article VII:

> "If owners of a majority of the frontage to be assessed shall petition for paving, and for any particular materials for the wearing surface, then the improvements shall be ordered, and the material so designated shall be used; but no paving shall be ordered unless a petition for the same be first presented, subscribed by the owners of a majority of the frontage to be assessed for the same; and in every instance the material shall be so described in the specifications, either by standard or quality, as will admit of genuine competition between contractors, so that there can be at least two or more bids by individuals or companies in no manner connected with each other."

Such a petition, and in fact petitions, were filed with the board of public works, and were found by the board of public works to contain a majority of the frontage to be assessed. (Pages 2 and 26, Abstract.)

The charter aforesaid also provides, proviso fourth, article VII:

> "If, within the time specified in said notice, a remonstrance against the making of the improvements shall be filed with the sec-

retary of said board (public works), subscribed by the owners of a majority of the frontage which is to be assessed, the improvements shall not be made, and proceedings shall not be renewed for six months."

No remonstrance was filed. Proviso second, article VII:

"The board shall by advertisement for twenty days in two daily newspapers of general circulation, published in the city of Denver, give notice to the owners of the real estate in the district, of the kind of improvements proposed, the number of installments and time in which the costs will be payable, the rate of interest on unpaid installments, the extent of the district to be assessed, the probable cost as shown by the estimates of the engineer, and the time, not less than thirty days after the first publication, when a resolution ordering the improvements will be considered by said board; that said map and estimates and all resolutions and proceedings of the board in the premises are on file, and can be seen and examined at the office of the board during business hours, at any time within said period of thirty days, by any person interested; and that all complaints and objections that may be made in writing concerning the proposed improvements, by the owner of any real estate to be assessed, will be heard and determined by the board before final action of the board thereon."

This notice was given, containing all the provisions required by the act aforesaid, and no complaints or objections were made by any of the parties to the suit to the board of public works within the said period of thirty days. (Page 4, Abstract.)

At the time fixed in the said notice—which we shall call the first notice—the board of public works duly considered the resolution, and duly passed the same, creating the Eighth avenue paving district, and ordering the pavement thereof with asphalt. (Page 8, Abstract.)

The next step prescribed is section 2 of article VII:

> "Whenever the board of public works shall, by resolution, order any of the local improvements herein mentioned, the same shall be authorized by ordinance; which ordinance shal be in form recommended by the board of public works by endorsement thereon, and shall not be subject to amendment by the city council."

The resolution passed by the board of public works contained an ordinance, which it recommended and endorsed to the city council in the premises (page 9, Abstract), and the same was thereafter passed by the city council at a regular meeting, public in character, without any protests or objections by any of the parties to this suit to the passage of the same by the said council. (Pages 10, 11 and 12, Abstract.)

In said ordinance (page 11, Abstract) the council found as follows:

> "Prior to the passage of said resolution, certain petitions for said improvements were

first presented to the board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the charter required."

Thereafter a contract for the work was duly let by the board of public works, under the provisions of the charter, and Eighth avenue was paved.

Upon the completion of a public improvement the charter (section 29, article VII) provides:

"* * * the board of public works shall prepare a statement therein showing the whole cost of the improvement, or such part thereof, including six per cent. additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this state made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk."

This action was duly taken by the board of public works.

Section 30, article VII, then provides for the second notice, or notice of completion of the improvement:

"The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published in the city

of Denver, notify the owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council, and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements."

This notice was duly given. (Page 15, Abstract.)

Section 31, article VII, provides:

"After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

A protest (page 37, Abstract) was filed in the time fixed.

The city council thereafter sat as a board of equalization in the matter of the assessment complained of, and at such sitting were present some of the parties to this action, in person or by attorney, and presented their objections to the assessment as made against the lots in the district. The objections were overruled, and the city council, having no recommendations to make to the board of public works in reference to the modification of the apportionments, it being clear that the apportionment was made as required by the provisions of the charter, the apportionment of the board of public works was approved, and thereafter the city council did by ordinance (page 17, Abstract) assess the cost of the improvements against the real estate in said district respectively in the proportions required by the charter. The assessment as prescribed in the charter was what is known as the "front door rule," as follows, section 4, article VII:

> "In case of the improvement of any street as hereinabove provided, the cost of the improvement, except in the intersection of streets and alleys, and except the share to be paid by street railway companies, shall be assessed upon all the lots and lands abutting on the street improved, in proportion as the frontage of each lot or tract of land is to the frontage of all the lots and lands so improved, the sides of corner lots, which sides abut on a street so improved being regarded as frontage; Provided, That where the real estate abutting on the street improved consists of lots or lands which are not of sub-

stantially equal depth, then the same may be assessed to a substantially equal depth, not less than twenty and not more than one hundred and fifty feet from the street improved, as the same may be determined by the board of public works."

Section 5:

"In case of the improvement of any street, the cost of the improvements in each street intersection, except the share to be paid by street railway companies, shall be assessed upon all the frontage on the street improved, and on the intersecting streets within a distance of one-half block in each direction from such intersection in proportion to the frontage of each piece of real estate on the street improved or on any intersecting street, or on both, within said distance; and the cost of each alley intersection shall be assessed upon all the real estate in the same block in proportion to the frontage on the street improved."

In said assessing ordinance the council enacted, in section 1 (page 18, Abstract), as follows:

"That upon consideration of the premises the council doth find that said improvements were duly ordered, and that in their action and proceedings in reference to said improvements said board has fully complied with the charter and ordinances of said city relating thereto."

Some testimony was introduced in the case in reference to the assessments as against some pieces of property, to show that the front foot rule as applied to the property in the district was unjust, and amounted, in effect, to confiscation. But relief in this case is not sought by the owners of these particular pieces of real estate because of the method of assessment against them specifically, but the whole assessment, as made over the whole district, is attacked as unconstitutional and in violation of the fourteenth amendment to the Constitution of the United States. The theory being that if the assessment is wrong as to a few pieces, therefore the whole is vitiated, and the provisions of the charter of the city of Denver prescribing such a rule of assessment can not stand; in other words, the plaintiffs below are not seeking relief for themselves, with reference to their specific property, on account of the method of assessment, but are seeking to relieve the whole district, and themselves indirectly, from assessment, because of what they claim an unjust assessment against themselves. The testimony introduced in the case, however (Abstract, pages 43-48), shows that the improvement was a special benefit to property in the district. Every witness produced by the plaintiffs testified to the effect that the paving was a benefit to property in the district, but they differed as to the amount of special benefi.

The Supreme Court of the state of Colorado decided this case on appeal in favor of the city of Denver et al., upholding the validity of the assessment, and the decision will be found in the 33d Colorado, at page 111.

As we understand the assignment of errors, three federal questions are sought to be raised:

First. Subsection 6, section 3, article VII, hereinafter set out, is repugnant to the fourteenth amendment to the Constitution of the United States, because it does not provide due process of law, in that no notice or hearing is given property owners before action by the council in the matter of whether the petition is a majority petition or not, and the finding of the council is made conclusive on courts.

Second. The provisions of article VII of the charter do not provide sufficient notices and hearings for property owners, in reference to assessments for public improvements, to comply with "due process of law," as defined in the fourteenth amendment to the Constitution of the United States.

Third. The "front foot" method of assessment or rule of apportionment provided for in said article VII violates the fourteenth amendment to the Constitution of the United States, as denying equal protection, etc.

We shall discuss these in the order stated.

ARGUMENT.

I.

The part in question of subsection 6 of section 3, article VII of the charter of 1893 of the city of Denver is as follows:

> "And the finding of the city council by ordinance that any improvements provided

> for in this article were duly ordered after notice duly given, or that the petition or remonstrance was, or was not, filed, as above provided, or was, or was not, subscribed by the required number of owners as aforesaid, shall be conclusive in every court or other tribunal."

This section violates no provision of the 14th amendment of the Constitution of the United States. It provides for matters wholly within the discretion of a state legislature in reference to municipalities.

The control of a municipality over its streets is plenary. It may improve them as it sees fit, and the method of procedure is within the legislative discretion. It may prescribe such initiatory formalities as it deems expedient. The inherent power being present, the mode of initiating the work is purely a question of legislative will. Any failure to comply with a formality which the legislature may prescribe in such matters may be adjusted by statute curative or limitative in operation, that is, provided it is not a jurisdictional matter under some constitutional provision.

Admitting, for the sake of argument, that the petitions in this case were defective in that they were not signed by a majority of the abutting property owners on Eighth avenue, yet when the city council found, as it did (page 11, Abstract), that the petition was a majority petition, the matter was settled. It was made conclusive by legislative enactment, and it became wholly immaterial then in the matter of improving the avenue as to whether there was a petition or not. The legislature might have provided for the improvement of the street in the first place without a petition.

We can probably most satisfactorily present our argument to this court upon this question by quoting from the opinion of the Supreme Court of Colorado in the case of the City of Denver et al. vs. Dumars et al., 33 Colo., page 94, wherein is considered the provision under discussion with reference to the preliminary notice in the matter of a sewer construction. The court said:

> "There is no requirement of law, other than the charter provision referred to, which renders it necessary for the board of public works to publish the preliminary notice of intention to create a storm sewer district. The hearing accorded owners of property in the district by virtue of this notice is not final or conclusive. No assessment is made thereunder. Opportunity is still afforded the owner to be heard before the passage of an ordinance finally fixing the assessments on the property in the district. He is, therefore, deprived of no fundamental rights by virtue of the authority vested in the city council to make its finding on the sufficiency of the preliminary notice by the board final and conclusive. It was the purpose of the law in making this provision to empower the city council to finally set at rest the regularity of certain preliminary steps taken by the board in the creation of the district, including that of giving notice. In effect, action thereunder is curative in its nature, and was intended to prevent irregularities which deprived owners of no constitutional rights

from invalidating the proceedings of the board. When the irregularity of a proceeding consists in the mode or manner of doing some act which might have been made immaterial by a prior law, it is equally competent to make the same immaterial by subsequent law. Cooley on Const. Limitations, 457; City of Clinton vs. Walliker, 98 Iowa, 655; 68 N. W., 431. The legislature has the authority, so long as constitutional rights are not invaded, to provide in special proceedings what questions may be tried by the courts and what not. Elliott on Roads and Streets (2d Ed.), section 593. As before stated, there is no constitutional provision requiring the giving of the preliminary notice by the board. It is purely statutory, and might have been dispensed with in the first instance. The notice which the charter requires shall be given by the city clerk, and the proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property, and it is, therefore, competent for the legislature to empower the city council to conclusively determine the sufficiency of the preliminary notice given by the board."

The argument of the court above applies with equal force to the situation in the present case in regard to the petition, and was so applied by the Supreme Court of Colorado in its decision in this case (Opinion, Abstract, page 950) as follows:

"By the pleadings filed on behalf of the plaintiffs in the court below the sufficiency of the petitions by the property owners was questioned as a fact, in that it was pleaded that a majority of such owners had not signed the petitions requesting the paving of Eighth avenue. The charter provides that the board of public works may order the grading, curbing and paving of any street; provided, however, that the owners of a majority of the frontage to be assessed shall petition therefor. Subdivision 3, section 3, article 7 (section 160), Charter. It is, no doubt, true that the conditions precedent which the law points out shall be observed by city authorities in ordering improvements must be complied with, and that, as a general rule, their failure to do so does not give them jurisdiction to proceed. This general proposition, however, is not applicable in this case. The proceedings to pave the streets in a given district are to be initiated by the board in the manner indicated, but it is left with the city council to finally pass the ordinance creating the paving district. In performing this function it is left to that body to determine whether or not certain preliminary steps which the law requires to be taken by the board of public works have been complied with. The law further provides that the finding of the city council by ordinance that a petition was or was not filed, or was or was not subscribed by the required number of owners, shall be conclu-

sive in every court or other tribunal. In the ordinance creating the paving district the city council did find as a fact that petitions for paving the street subscribed by the owners of a majority of the frontage to be assessed for paving the street in the paving district were presented to the board of public works. It is only because of the provisions of the charter that a petition by the owners of property must be addressed to the board of public works before the latter are authorized to take the preliminary steps to pave the streets. The owners are not entitled to so petition by the fundamental law. The legislature might have dispensed with this prerequisite. The board of public works, it is true, would be without jurisdiction to take the preliminary steps in the absence of such petition, and, no doubt, in such case, up to the time when the city council acts upon their recommendation as to the creaiton of a paving district, and determines that the necessary petition subscribed by the owners has been presented to the board of public works, the latter could be enjoined from presenting any recommendation to the city council; but there is a stage in the proceedings when the question of the sufficiency of the petition and the number of owners subscribing it is no longer open, if the city council, in passing the ordinance creating the district, has found the facts from which it can be inferred that the law in this respect has been complied with.

This is a matter which the legislature, in its discretion, has the authority to commit to the finding and determination of the city authorities. Such a law is not unconstitutional, because it does not deprive property owners of any rights which they are entitled to assert under the fundamental law of the state, and hence the legislature has the authority to say at what time and by what body the findings of fact as to certain preliminary steps of the nature under consideration shall become final and conclusive. City vs. Dumars, 80 Pac., 114; 2 Dill. (4th Ed.), section 800; Dennison vs. City of Kansas City, 95 Mo., 416; 8 S. W., 429. In brief, the findings of fact by the city authorities as to those matters which are not inherently jurisdictional are conclusive when the law authorizes them to determine such facts, and provides that their findings thereon shall be conclusive. In Dennison vs. City, supra, the charter provisions of the city under consideration provided that notice to owners should be given before findings of fact with respect to certain matters could be made. It was held that a hearing under these provisions must be afforded the owners, but the opinion distinctly holds that the legislature could have conferred upon the city authorities the power to improve the streets of the city at the cost of the property owners without requiring the preliminary steps referred to. It further recognizes that the findings of fact by the city council as to those matters

committed to that body by law are conclusive. The many authorities cited by counsel for appellees to the effect that a failure upon the part of the city authorities to comply with prescribed preliminary steps renders the proceedings void, are not in point. They are based upon the proposition that the steps prescribed must be observed, otherwise jurisdiction does not attach. Unlike the case at bar, however, they were decided in states where there was no provision of law whereby the findings of the city authorities that the preliminary steps had been taken, were conclusive."

City of Denver et al. vs. Londoner et al., 33 Colo., page 9.

And, again, the court, in its opinion upon the petition for rehearing, 33 Colo., page 121, says (Abstract, page 61):

"It is urged we erred in holding that the findings of the city council, without notice or opportunity for the taxpayers to be heard on the sufficiency of the petition, was conclusive upon the property owners. Findings on questions of fact touching matters inherently jurisdictional would probably not be conclusive without notice and opportunity to be heard, but ex parte findings with respect to steps which the charter prescribes, and which are not required because of any constitutional provision, are final when the charter so provides. Were it not for the

provision in the charter authorizing the municipal authorities to find ex parte on the sufficiency of the petition, no doubt such finding, in the absence of notice to the taxpayers and opportunity to be heard, could be attacked collaterally; but, as the finding relates to a matter which is not inherently jurisdictional, and as the charter authorizes it to be made in the manner it was, the facts upon which it is based can not be questioned. The authorities cited by counsel do not hold to the contrary. Mulligan vs. Smith, 59 Cal., 206; Zeigler vs. Hopkins, 117 U. S., 683; 6 Sup. Ct., 919; 29 L. Ed., 1019, and Miller vs. City of Amsterdam, 149 N. Y., 288; 43 N. E., 632, are cases holding that findings of fact by the municipal authorities without notice to the taxpayers were not binding upon the latter; but it will be observed that in each of these cases the city authorities were not authorized to determine the questions ex parte."

The following is the well settled rule:

"The constitutional provision relative to due process of law is fully complied with when the property owner is afforded an opportunity to be heard and test the validity of the special assessment, and the proportion of the general cost of the improvements which shall be assessed against his property."

City of Denver vs. Kennedy, 33 Colo., 80.
Brown vs. City of Denver, 7 Colo., 305.

Pittsburg Ry. Co. vs. Board Public Works, 172 U. S., 45.

Bauman vs. Ross, 167 U. S., 548.

25 Ency. of Law, 2nd Ed., 1173.

Fallbrook Irrigation Dist. vs. Bradley, 164 U. S., 112.

There is no federal question involved here.

Mr. Justice Field, in Williams vs. Supervisors of Albany, 122 U. S., 154, 164, in considering the power of a state as to assessment and collection of taxes, said:

> "The mode in which the property shall be appraised, by whom its appraisement shall be made, the time within which it shall be done, what certificate of their action shall be furnished, and when parties shall be heard for the correction of errors, are matters resting in its discretion. Where directions upon the subject might originally have been dispensed with, or executed at another time, irregularities arising from neglect to follow them may be remedied by the legislature, unless its action in this respect is restrained by constitutional provisions prohibiting retrospective legislation. It is only necessary, therefore, in any case to consider whether the assessment could have been ordered originally without requiring the proceedings, the omission or defective performance of which is complained of, or without requiring them within the time designated. If they were not essential to any valid as-

> sessment, and therefore might have been omitted or performed at another time, their omission or defective performance may be cured by the same authority which directed them; provided, always, that intervening rights are not impaired. Such is the conclusion of numerous adjudications by the state courts upon the effect of curative acts, and of this court in Mattingly vs. District of Columbia, 97 U. S., 687, 690; Hart vs. Henderson, 17 Mich., 218; Musselman vs. Logansport, 29 Ind., 533; Grim vs. Weissenberg School District, 57 Penn. St., 433."

In Castillo vs. McConnico, 168 U. S., 674, this court held that the question whether a provision of the statute in Louisiana was unconstitutional in providing in tax matters that a tax deed "shall be conclusive evidence" of certain facts, among which was that the taxes were levied according to law, was not a federal question, but a local one, and the state court decision would not be reversed. There it was asserted that a particular assessment was void because of a mistake in the name of the person whose property had been assessed, and the deed could not be conclusive so as to deprive plaintiff of a hearing. The court said:

> "The claim, then, is that the assessment in question did not constitute due process of law within the fourteenth amendment because of error in the name of the owner, although the assessment would have been due process if, under the state law, it had not

been required to mention the name of the owner, that is to say, that the assessment is repugnant to the Constitution of the United States, because of the lesser when it would not have been in conflict with the Constitution for the greater omission. This deduction demonstrates the error of the proposition relied on, and it can not be escaped by saying that, although the state had the power, without violating due process of law, to dispense with the name, nevertheless, where the state statute has directed the use of a name in making an assessment, a defective giving thereof renders the assessment wholly void and a want of due process of law."

The argument we would make here is so concisely and ably presented in the foregoing case on page 683 that we beg to quote and apply the same here:

"The vice which underlies the entire argument of the plaintiff in error arises from a failure to distinguish between the essentials of due process of law under the fourteenth amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and can not be departed from without violating the Constitution of the United States. The other depends on the lawmaking power of the state, and, as it is solely

the result of such authority, may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is, what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always the statute as thus construed does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court."

We have shown the Supreme Court of Colorado has twice decided that the matters referred to in the section under consideration were not essential in the making of public improvements under the Colorado Constitution. There is no provision of the federal Constitution forbidding the state from granting to a tribunal, whether called a court or not, the final determination of a legal question.

Murray's Lessee vs. Hoboken Co., 18 How., 272.

Bushnell vs. Leland, 164 U. S., 684.

Public Clearing House vs. Coyne, 194 U. S., 497.

In the following state courts the matter of insufficient petitions and a curative act were considered, and the statute upheld on the ground that no petition was necessary in the first place:

Richmond vs. Supervisors, 77 Iowa, 513.

Whitney vs. City of Pittsburgh, 147 Pa. St., 351.

Nottage vs. City of Portland, 58 Pac., 883.

EVIDENCE IN RE PETITION.

Should a consideration of the testimony regarding the petitions in this case be deemed material, we present the same as showing that, independent of the finding by the council, a majority petition as prescribed in the charter was filed with the board of public works.

First. Filed May 24, 1897, Trinidad petition (Abstract, pages 1 and 2).

Some withdrawals alleged which made it a minority petition.

Second. Filed January 18, 1898, Alcatraz petition (page 26, Abstract), which stated that "in case any other petition is before your boards for any or all of the purposes herein set forth, we file this in addition to and supplemental to the said petition, and for the purpose of better carrying out and accomplishing of such other petition or petitions, and for the best interest of the property owners concerned.

This second petition was signed, according to the report of the engineer of the board of public works, by the owners of 8,742.32 feet of frontage (page 29,

Abstract). One-half of the frontage was 8,497.54 feet (Abstract, page 27); owners of 8,593½ feet frontage, signing second petition, were also signers of first one. The second petition was, therefore, a majority petition, and, furthermore, the second petition was signed by those owners who withdrew from the first petition, if we grant, for the sake of argument, that by their withdrawing in time from the first they left it a minority petition. The second was intended, as per its terms, to be taken in conjunction with the first, and the two together in fact constituted a big majority petition by the owners of the frontage in the district.

It is attempted to be shown that some of the same signers who withdrew from the first petition, and who again signed the second, again withdrew from the second, but no positive or even creditable inferential testimony was given of this fact. The mandamus suit instituted to compel the board of public works to receive withdraws from some petition (Abstract, page 29)—which one of the two it nowhere clearly appearing—was never pressed by the plaintiffs, and was by stipulation dismissed on August 15, 1899, and this in the face of the fact that the board had by resolution outlined the district on May 18, 1899 (Abstract, page 10), and the city council had enacted on June 1, 1899, an ordinance creating the Eighth avenue paving district No. 1, and finding therein that (page 11, Abstract) "Prior to the passage of said resolution certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements, as by the city charter required."

The plaintiff in error here, by not pushing that case, permitting the board and council to act, allowing the petitions to be acted upon as majority petitions, and their signatures to be treated as genuine and not withdrawn, are now estopped to assert any right, and must be considered in this case as having waived all right to object to the proceedings of the board and the council in reference to the petitions whereon appeared their signatures. They had the right and opportunity to correct the matter and to prevent action—a suit had actually been brought—but they consented to all that was done, dismissed the suit, stood by and saw the improvement made, accepted whatever special benefits arose thereby, and now seek to avoid their liability by resorting to alleged defective petitions, which they admit they signed, alleged they withdrew from, but nowhere prove by any substantial evidence, but which affirmatively appears from their own case they recognized and allowed to be considered valid and binding.

The position of the plaintiffs in error, and the others associated with them in the state courts, is humorous. They signed a first petition for the paving, then assert they withdrew their signatures; they signed a second, allege they again withdrew; then filed a mandamus suit to compel the board of public works to receive their withdrawals from the first and second; then they withdrew the mandamus suit, thereby withdrawing from their position that the board must receive their withdrawals; permitted the petitions to go unchallenged and be acted upon by board and council, thereby in law withdrawing from all former withdrawings.

II.

The notices and hearings provided for in the charter of the city of Denver under which the paving was done in Eighth avenue paving district are sufficient to constitute due process of law under the fourteenth amendment to the Constitution of the United States.

Having quoted the provisions of the charter in the statement of the case, we shall not quote them again, but refer to them merely in our argument.

It will be noticed that property owners have two formal hearings provided for. The first one is before the board of public works upon the question as to whether the improvement shall be ordered. Notice as to this hearing and the time when the board of public works will consider the ordering of such improvements is published for twenty days in two daily newspapers, the property owners are notified that thy may examine the specifications, maps, estimates and plans of the work at the office of the board of public works at any time during thirty days, and may file complaints and objections with the board, and that hearing will be had thereon before final action of the board creating a district. Thus at the very inception of the improvement property owners have full opportunity to object, and influence by argument and testimony the action of the board of public works. When the board of public works decides by resolution to order the improvements, and defines the district, their action is not thereby final so as to fasten the improvement upon property, but it only becomes operative and effective as a law when by ordinance the city council shall approve its action,

establish the district, and order the improvements. The board of public works simply recommends an ordinance to the city council. The city council is the legislative body of the city government, and its proceedings are public, and any citizen interested in the proceedings of the city council has the right to appear before that body when it is about to act upon anything affecting him, and influence its action as best he can, and show the body that in the passage of an ordinance it will inflict upon him an unjust burden, and something that the property owners in any particular part of the city desire to escape, so that in fact when an ordinance recommended by the board of public works is presented to the city council, and it seeks to pass such an ordinance, its meeting being public, and the time thereof a public record, the opportunity is again presented to any citizen to be heard, and while there is no prescribed right in the charter to a hearing at that time before the city council, it follows as a natural conclusion, however, that any interested property owner would have a right to be heard. That such hearing is effective is shown in the testimony of Witness Carpenter (Abstract, page 28), who says the first ordinance recommended to the council in this improvement was killed by him and others in the council.

It is contended that the city council has no discretion in the matter of passing the ordinance recommended by the board of public works for the creation of a district, because the charter, section 2, article VII, says: "Which ordinance shall be in form recommended by the board of public works by endorsement thereon, and shall not be subject to amendment by the city council." It is asserted that the passage of

the ordinance is mandatory when recommended by the board of public works, but the Supreme Court of the state of Colo do decided that it is directory, and the city council has the discretion to pass the same or refuse to pass it. The only power which was abstracted from the city council was the right to amend the same. This certainly is a wise provision, for the board of public works, having carefully gone over the territory, mapped out the work, defined the lines, considered the property and the character of improvement, consulted with the property owners, given notice and had a hearing upon the matters involved, is in a better position to present a plan both for improvement and extent of territory in the district than the city council would be within the time limited for its procedure, and the size and complexity of its organization; but when the ordinance is before the city council it may refuse to pass it at all, if the pressure of property owners is sufficient to lead the council to believe that the district should not be created. The familiar rule of construction will be applied to these provisions, viz.: that where a construction can be placed upon an act which will uphold its validity and make it operative, such construction will be applied, rather than one which will render it void or inoperative.

The charter of the city of Denver further provides that when the contract is let, and the work is being done thereunder, supervised by the board of public works, any property owner may complain to the board of public works if the work is not being properly done according to the contract.

Section 47, article VII:

> "* * * Upon complaint of the owner of any real estate to be assessed for the improvements, that the improvement is not being constructed in accordance with the contract, the board of public works may consider the complaint and thereupon make such order in the premises as shall be just; and the decision of the board shall be final."

So that property owners have a hearing and a remedy in such matters.

When the work is completed, and before the assessment is fastened as a lien on the property abutting on the street improved, the second notice, which is the vital jurisdictional notice in matters of street improvements, must be given by the city clerk, giving property owners full information, and notifying them of their opportunity to file complaints and objections, and of the fact that the city council will sit as a board of equalization upon said assessment. The opportunity is thus afforded to any property owner deeming himself aggrieved by the assessment to object and complain, have a hearing thereon, and get such relief as would appear to the city council to be warranted, in the form of recommendations back to the board of public works for a modification of the assessment. The board of public works takes up the recommendations of the city council, and acquiesces therein or refuses to agree thereto, and returns the matter to the city council, and before the lien is fastened upon the property the city council must make the assessment by ordinance; and here again the city council is at liberty to refuse to pass the ordinance if the board of public works refuses to acquiesce in

the modifications which it may have suggested to the board. It is not compelled by law to pass the assessing ordinance; it has discretion in the matter. It has heard the complaints and objections of property owners, and is advised. Property owners have full opportunity to influence the action of the city council when the passage of the assessing ordinance arises.

In the case at bar, as in all cases of paving of streets under the charter, there is no discretion, however, lodged in the city council or in the board of public works in the matter of making the assessment, because the charter itself prescribes the rule or method of apportionment, viz.: by frontage, and it is only a matter of mathematical calculation on the part of the board of public works and the city council sitting as a board of equalization in ascertaining the amount to be assessed against each lot in the district.

The Supreme Court of the state of Colorado has several times passed upon the constitutionality of the provisions of the charter, declaring that its notices and hearings constitute due process of law, both under the state and federal Constitutions.

In City of Denver vs. Kennedy et al., 33 Colo., page 90, the court says:

> "We shall next consider the questions raised below concerning the constitutionality of the charter provisions under which the district was created, and the proceedings adopted which finally culminated in the levy of the assessments of which plaintiffs complain. The charter provides that the cost of construction of viaducts shall, unless otherwise ordered, be assessed upon all the real

estate in the districts benefited. This means against the district specially benefited—25 Enc. Law, 2 Ed., 1184—and there is, therefore, no merit in the contention of counsel for appellees, that the law gives the city authorities unlimited power to assess the expense of a viaduct to particular property without regard to special benefits. The charter further provides that after the completion of the improvement, the city clerk, by advertisement for a time specified, shall notify the owners of real estate to be assessed that the improvement has been, or is about to be, completed and accepted, therein specifying the whole cost of the improvements, and the share apportioned to each lot or tract of land, and that any complaints or objections that may be properly made by the owners to the city council and filed with the city clerk within the time provided will be heard and determined by the proper city authorities before the passage of any ordinance assessing the cost of the improvement. After the period specified in this notice, the city council is directed to sit as a board of equalization, and hear and determine all such complaints and objections as may be made in pursuance of the notice above required, and that on consideration thereof, it may recommend any modification of the apportionments made by the board of public works as may seem equitable and just. These provisions afford the owners of real estate in the district full opportunity to be

heard upon any and all questions affecting their rights. The constitutional provision relative to 'due process of law' is fully complied with when the property owner is afforded an opportunity to be heard and test the validity of a special assessment and the proportion of the general cost of the improvements which shall be assessed against his property."

In City of Denver et al. vs. Dumars et al., 33 Colo., page 96, the court said:

"Before an assessment against property can be made for the construction of a storm sewer, the city clerk is required by advertisement to notify the owners of real estate to be assessed, which notice, among other things, shall specify that any complaints made in writing by the owners and filed within a specified time will be heard and determined by the city council before the passage of any ordinance assessing the cost of the sewer against the property in the district. The charter also makes it the duty of the city council, sitting as a board of equalization, to hear and determine all such complaints and objections before the assessment ordinance is passed. Certainly, under such a provision as the latter, although it does not enter into details, the law contemplates that the tribunal designated to hear and determine such complaints and objections as may have been filed against the assessments shall hear the parties complaining,

such testimony as they may offer in support of their complaints and objections as would be competent and relevant."

In City of Denver vs. Londoner—the case at bar—33 Colo., page 111, the court said:

"The general question, that the provisions of the charter give the owners an opportunity to be heard touching the assessments made upon their property to pay for local public improvements, has been discussed in the preceding cases of City of Denver vs. Kennedy, ante, page 80, and City of Denver vs. Dumars, ante, page 94; so that we shall not enter upon a further discussion of that question in the present case, except in so far as it relates to the proposition that because the judgment of the city council is not final, but is subject to the revision of the board of public works, the owners of property in a local improvement district are not afforded an opportunity to be heard touching the validity of an assessment, which the Constitution requires. In discussing this question considerable stress seems to be laid upon the language of the court in the case of Brown vs. City of Denver, 7 Colo., 305, wherein it is said, that the hearing contemplated must be 'before a board or tribunal competent to administer proper relief.' From that language it is argued that because the judgment of the city council is not final, but its action is subject to revision by the board of public works,

that therefore it is not a competent tribunal. The word 'competent,' as employed in the Brown case, does not convey any such meaning, but, rather, that the tribunal which the law designates shall be suitable and legally qualified to act. It does not necessarily follow that the judgment of such tribunal must be final. The main purposes of affording an owner a hearing upon the question of assessing his lands for special benefits are to give him the opportunity to be heard upon the *quantum* of the tax which may be assessed upon his land, as well as its validity. If this hearing is afforded at some stage of the proceedings, he is given the opportunity to be heard which the fundamental law contemplates. The Supreme Court of the United States, in Bauman vs. Ross, 167 U. S., 548, in discussing the question of what constitutes due process of law under statutory provisions for assessing the cost of public improvements to the owners of land benefited thereby, says, at page 590:

"'If the legislature, in taxing lands benefited by a highway or other public improvement, makes provision for notice by publication or otherwise to each owner of land, and for hearing him, at *some* stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law.'

"Under that authority the provision for the hearing before the city council satisfies

> the requirement of the Constitution with respect to due process of law. The owners are afforded full opportunity to be heard touching the question of the apportionment of the special tax upon their property before the levy is finally made. The remedy thus afforded them is appropriate, and the tribunal designated to hear their complaints and objections is a suitable one, and legally qualified to act."

These decisions of the Supreme Court of Colorado are supported by the decisions of this Honorable court in the following cases:

Spencer vs. Merchant, 125 U. S., 345.

Falbrook Irr. Dist. vs. Bradley, 164 U. S., 112.

Bauman vs. Ross, 167 U. S., 548.

Parson vs. Dist. of Columbia, 170 U. S., 45.

Paulson vs. Portland, 149 U. S., 41.

Pittsburg R. R. Co. vs. Board of Pub. Works, 172 U. S., 45.

Kelley vs. Pittsburg, 174 U. S., 78.

Lent vs. Tillson, 140 U. S., 316.

Pittsburg Ry Co. vs. Backus, 154 U. S., 421.

Heman vs. Allen, 172 U. S., 559.

We take it that due process of law does not require a judicial hearing in the ordinary acceptation of that term, but is complied with in matters of as-

sessments for public improvements if the parties assessed have an opportunity to be heard either before a juridicial tribunal or before a board of assessment at some stage of the proceedings.

Hibben vs. Smith, 240 Sup. Ct. Rep., 88.
U. S. vs. Ju Toy, 198 U. S., 253.

It will be seen that the rule or method of apportionment being fixed, of which fact every property owner was advised, the hearings provided for were more than ample, according to the doctrine stated in Mich. Ry. Tax Cases, 138 Fed., 223, as follows:

> "Due hearing need not be provided before fixing a tax rate where the legislature has left the taxing board a mere clerical function of calculating the rate which it has no power to change."

> "Even without a hearing before any court, the hearing before the municipal body is judicial."

EVIDENCE CONCERNING THE HEARING GIVEN PLAINTIFF IN ERROR BEFORE THE BOARD OF EQUALIZATION.

We confidently assert that no protest, as contemplated by the charter, was filed by the plaintiffs in error or any one else, because the protest (page 37, Abstract) filed with the clerk under the second notice, and which was presented and argued to the council

sitting as a board of equalization, was not a protest upon matters within the jurisdiction of the equalization board, with a possible exception of the third, but this was general and went to the whole assessment and pointed out no particular property or instance wherein the assessment was inequitable. It was an attack on the front foot rule or method of apportionment fixed in the charter, and with reference to which the board and the council had no discretion, but were compelled to follow. The council, therefore, did well in overruling the same. It had nothing to do with the general attack on constitutional grounds or on the irregularity of the proceedings. Its duty was to equalize the assessment, if possible, and the duty of the protestants was to complain within the limits of action so presented by the charter. None of the specific objections in reference to the assessment on the property of plaintiff being in excess of special benefits were pointed out. The action of the equalization board was certainly proper under the circumstances. (Page 41 of the Abstract.) The same is as follows:

> "Supervisor Fillius offered the following:
>
> "Whereas, Complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth avenue paving district No. 1 of the city of Denver, against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, No complaint or objection has been filed or made against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, That the apportionments of said assessment made by the said board of public works be, and the same are hereby, confirmed and approved.

"The resolution was adopted by the following vote: Ayes, Canon, Uzzell, Wilson, Fillius, Bailey, Bennett, Conlon, Kelly, Lathan, Murray, Phillips, Scanlon, Golder (13); nays, none."

The plaintiffs in error certainly had a full opportunity to be heard on the matters complained of in the complaint concerning the inequity of the assessment on their specific property. They did not take advantage of it, and the failure of the council to consider it was the fault of plaintiffs.

This was the vital, jurisdictional hearing, and plaintiffs neglected it, and surely are not in a position to complain now.

The Supreme Court said in its opinion in denying the petition for rehearing (Abstract, page 60):

"It may be questionable if plaintiffs filed any protests or objections which the

law contemplates shall be heard and determined by the city council sitting as a board of equalization. If they did not, then the matter of notice to them of a hearing on such as they did file would be immaterial."

III.

The method of assessment prescribed by the charter of the city of Denver, being the so-called front foot rule, does not violate any provision of the fourteenth amendment to the Constitution of the United States, or any other provision of the federal Constitution.

We have heretofore set out the section of the charter prescribing the method of assessment, the same being sections 4 and 5 of article VII of the charter.

The Supreme Court of the state of Colorado has upheld the front foot rule as a valid and constitutional method of assessment.

In Pueblo vs. Robinson, 12 Colo., 599, the court said:

> "The mode of apportionment by which local assessments are to be made must have reference to the special benefits accruing to the property by reason of the improvement—that is, benefits in addition to those received by the community in general; and the rule must be such as will secure an assessment in proportion to such benefits as nearly as is reasonably practicable. Rules

of apportionment according to value, area and frontage of the property benefited have in turn been approved and disapproved under varying circumstances. Absolute equality is not to be expected; reasonable approximation thereto is all that can be required; and when the proper legislative body prescribes in good faith a rule by which this may be attained with reasonable certainty, it should not be overthrown. When the property consists of lots of substantially equal depth abutting the local improvement, and there is nothing in the nature and circumstances of the particular case showing that an assessment in proportion to the frontage of the lots upon the improvement would work manifest injustice, such a mode of assessment would be upheld. 2 Dill. Mun. Corp., section 761; Cooley, Taxation, 447; Thomas vs. Gain, 35 Mich., 155; Allen vs. Drew, 44 Vt., 174."

And, again, in Denver vs. Knowles, 17 Colo., 211, 212:

"Different principles of apportionment have been adopted in different states, and sometimes in the same state at different times. See Emery vs. San Francisco Co., *supra*. In some way the cost of the improvement should be assessed upon the property in proportion to the benefit received by it. Absolute equality, however, can not be expected. *The duty of determining the mode to be*

adopted is peculiarly within the province of the legislative department of the government. And where substantial equality has been provided for, the courts will not interfere."

We deem that this provision of the charter has been so thoroughly discussed by this honorable court that we need but cite the court to its decisions in reference thereto, and especially the leading case of French et al. vs. Barber Asphalt Paving Co., 21 Sup. Ct. Rep., 625, in which the court upheld the provisions of the charter of Kansas City, Missouri, almost exactly similar in language to the charter of the city of Denver.

Town of Tonawanda vs. Lyon, 21 Sup. Ct. Rep., 609.

Cass Farm Co. vs. Detroit, 21 Sup. Ct. Rep., 645.

Farrell vs. West Chicago, Park Com., 21 Sup. Ct. Rep., 609.

Shumate vs. Heman, 21 Sup. Ct. Rep., 645.

Webster vs. City of Fargo et al., 21 Sup. Ct. Rep., 623.

City of Detroit et al. vs. Parker, 21 Sup. Ct. Rep., 624.

Spencer vs. Merchant, 125 U. S., 345.

Hagar vs. Reclamation District, 111 U. S., 201.

Davidson vs. New Orleans, 96 U. S., 19.

Walston vs. Nevin, 128 U. S., 578.

Mattingly vs. Dist. of Columbia, 97 U. S., 687.

A perusal of the testimony concerning the amount of the assessment (Abstract, pages 43-48) discloses an attack solely upon the "front foot" rule as applied to whole district and not alone to plaintiffs' lots, and the evidence fully established its approximate equality and justice as a method of apportioning the cost of the paving therein.

Wherefore we respectfully submit that the judgment of the Supreme Court of the state of Colorado should be affirmed.

HENRY A. LINDSLEY,
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Office Supreme Court, U. S.
FILED
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CLERK.

No. 157.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER 1907 TERM.

WOLFE LONDONER, ET AL., PLAINTIFFS IN ERROR.

vs.

CITY AND COUNTY OF DENVER, ET AL., DEFENDANTS IN ERROR.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

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What purports to be the "Statement of the Case" by defendants in error is so prolific in statements wholly outside of,—in many instances also flatly contradicted by,—the record in the case at bar, and a comparison of it with that record shows it so entirely inaccurate it could more justly be termed defendant's "*mis*-statement" of the case.

It would be almost impossible, without setting out *verbatim* a large portion of the record, to correct all the *post*-record statements, *mis*-statements and *half*-truth statements of defendants in error in their

brief as to what the printed record shows. I rely upon that record itself, and all I ask is its careful reading in full by this court before accepting as correct defendants' statement as to what it contains. When this is done the greater portion of the basis for counsels' really able argument vanishes because founded upon false premises.

There are some statements so misleading they necessitate more than passing notice, if for no other reason, in order to prevent serious misunderstanding of the *facts* of this case at the outset.

Counsel state this improvement was made in 1898 and 1899. This is perhaps not very material, though the record shows the fact and said statement incorrect. Next, they go outside the record and *conjecture* something about numerous plaintiffs. I respectfully submit the agreed record indicates, even in the least, no such state of facts as they claim, and their statement is entirely gratuitous. On page 2 that majority petitionS were filed, but the record flatly contradicts this. (Abst., complaint, middle of page 2, top and middle of 3, p. 4 and near top p. 10; evidence, pp. 27-29, 29-34). They say on page 3, and again on page 4, "no remonstrance was filed," but the record shows the contrary, and that *majority* remonstrances were duly filed (Abst., bottom p. 3, p. 6). On page 4 that the works board advertisement was in compliance with the statute; itself shows the contrary and that by reason of the lack of the required majority petition said board and city were without any jurisdiction to publish said advertise ment or act at all in the premises. They say that the so-called, but really void, ordinance claimed to have been passed by the council bears the required

endorsement of the works board thereon, as required by charter § 2. I but refer to the alleged ordinance itself set out in the record (p. 12) as showing directly the contrary. There was no such endorsement, and a *different* bill for an ordinance *not endorsed* by the works board was substituted, as I clearly show at pages 11 and 12 of my original brief. They say the council enacted this so-called ordinance at a *public* meeting. Though the record does not show what they state, but rather the contrary, I cannot well see what difference it makes how public in appearance the meeting may have been at which they claimed to enact the so called but really void ordinance if, as the record shows, no *investigation* whatever was made by the council and "no hearing or opportunity for hearing of any kind * * * was ever had or permitted." (p. 13.) At the bottom of page 4 they quote a mere recital in the void ordinance claiming it to be a finding by the city council, and again speak of majority petitionS having been presented. The trial court found contrary to counsels' contentions as to these matters, and the State Supreme Court disturbs none of these *fact*-findings of the trial court. The record shows the quotation to be a mere *recital in a void ordinance*, and not a finding after opportunity for hearings in a real ordinance. On page 5 they refer to charter § 30 and state the advertisement there called for was duly given. The record clearly shows that the only advertisement given called for the filing of protests "relative to said apportionment" only, (pp. 15 & 36), and that no notice of the *time* or place when the protests filed could be heard was ever given or any opportunity for hearings afforded. (pp. 15 & 16; see also original brief pages 125 to 146;

151 to 165.) On page 7 defendants state that the city council sat as a board of equalization, but such statement is absolutely contradicted by the specific allegations of the complaint (pp. 15 & 16), and finding of the trial court in accordance therewith. They state further that plaintiffs were present either in person or by attorney at this alleged meeting. This statement is entirely gratuitous and as clearly contradicted by the portions of the record just referred to as it is false in fact.

Counsel further intimate that the plaintiffs in error are attacking the whole assessment for the benefit of other persons. This is the first I ever knew of this absurd conjecture, and I do not conceive how this charge can carry sufficient weight in the face of this record to scarcely justify denying, especially if any credence be given counsels' equally inaccurate statement on the first page of their brief that *everybody else* in the alleged district except plaintiffs have paid their assessments. Both statements certainly cannot be true for they contradict each other, and were it material and did it not require a following in counsels' footsteps wandering outside of the record, both could and would be shown to be false,—so false, indeed, that no tax-buyer would bid on or purchase any of the other corner lots in this alleged district which were advertised at tax sale and confiscated by the assessments, the city in consequence being the forced holder (likely to remain such indefinitely) of numerous tax certificates it would like to get its money out of but, like the party with the itch, "don't know how."

I do not speak of these matters to be captious, but merely to illustrate how absolutely unfair it is

both to the court and to opposing counsel to mention even facts (to say nothing of conjectures or worse) not shown in the record itself. So much for counsels' "mis-statement of facts" on pages 1 to 9 of their brief.

I think I have stated the *facts* fairly, and as the record shows them to be, at pages 1 to 23 of my original brief. An extensive *re*-statement of them here would *therefore* be merely superfluous.

Most of their argument proper being based on their "*mis*-statement of facts," is equally fallacious. For instance: On page 11 they say, "when the city council found, as it did, *that the petition was A majority petition*, the matter was settled." I dislike so often to disagree with defendants, but the record clearly shows the city council never found what they claim, or the equivalent of it. This branch of the case is fully covered on pages 112-122 and 43-61 of my original brief, and in addition the alleged ordinance containing the alleged *recital* (it does not even purport to be a finding), was *itself* void.

On pages 24 and 25 something is said about Mr. Hart's mandamus suit and its dismissal by Hart, the inference being thrown out that this in some unexplained way amounted to a revival of signatures by Hart and by other parties to the always minority Alcatraz petition. Neither of the plaintiffs in error were party to that suit, nor had either of them ever petitioned for *any* paving. The inferences and conjectures counsel indulge in in this connection are purely imaginary, and where not contradicted by the record, are wholly outside of it. The dismissal by Hart of his individual mandamus suit, or even a withdrawal of all written withdrawals from the pe-

tition by Mr. Hart himself and by all other persons not parties to his suit, after once having filed written withdrawals from the petition with the works board, could not *revive* signatures to a petition for paving, even were it possible (as it was not) by including their signatures to make up a majority petition. (See pp. 4 to 8, original brief.)

The legal right of Hart, Campion, Mrs. Slayden, Mrs. Chamberlain, Bohm and Mrs. Hawkins to in writing withdraw from the petition as they did is not and cannot be successfully questioned. While so far as I can see, there is nothing strange in these parties acting (unlike the city) within the law, and were their motives known their acts might not appear even amusing. Whatever may have been their motives, plaintiffs in error were not their guardians or protectors against the blandishments and from the oily tongue or worse of the apparently suave circulator of the largely home-made "Jim the Penman" Alcatraz petition, and are no more responsible for what any of the above named prominent citizens did or failed to do, than any of those parties are or ever were responsible for or parties to this suit to vacate these assessments confiscatory of plaintiffs' properties. Here the really material fact, as the record shows, is that the city, when it started to act, did *not* have (and for that matter never had) a majority petition for Bermudez asphalt paving, being the wearing surface with which it attempted to order the street paved. The minds of those persons whose consent it was essential should agree to paving with the material used, never met in consenting to the paving ordered. (See discussion on pages 43 to 61 original brief).

In response to what on page 28 counsel term "the *familiar* rule of construction," I have only to say that *no construction whatever* is ever premissible where the language of the legislature is (as the opinion itself concedes it to be) *plain and unambiguous*. Authorities on this point are cited in abundance throughout my brief. The rule I have just mentioned is not only a rule of construction, but a rule of common sense and general legal jurisprudence of universal application so firmly imbeded that it has the force of law itself. It *is* law. The contrary is not and necessarily cannot be law, or due process of law, but more nearly approaches anarchy and defiance of law. It certainly is not the province of a court to *supply* law merely because none exists, or to *alter* concededly unconstitutional *unambiguous* legislative enactments merely because as enacted they are in violation of the 14th Amendment.

A critical examination of the charter provisions proviso "8" and § 31, and comparison of them with the record and opinion, must, I submit, convincingly establish that the charter provisions, as the *legislature* enacted them, could not justify an upholding of these alleged assessments. The opinion inferentially and necessarily, if not indeed specifically, concedes this. The court specifically concedes that charter § 31, as the legislature enacted it, violates the 14th Amendment. It concedes that charter proviso "8," without the aid of conjectural inference and additions in the way of legislation, conceded never to have been enacted by the legislature, is insufficient to cover the facts of this case. The State Supreme court, however, decides it will uphold these assessments. To do this it is necessary for it to, and it

confessedly did, itself legislate to fit the facts by *altering* the unambiguous but concededly unconstitutional charter § 31 of the legislature, and by judicial legislation, mis-termed construction, arbitrarily adds to the charter provisions taxing powers never granted to the city, and which, being based merely on *conjecture*, were never possessed by the legislature itself, and applies them to these particular assessments,—not as a rule or law to be applied in *all* similar cases, past, present or even future, or to all assessment cases even,—but to this case only and such few others as its *will* may see fit, leaving itself to apply and applying a contrary law to subsequent similar cases,—as for instance to the Ahern, to the Lambert case, to the Bircher case, to the Jenks case, to the Kilgore case, all of which were subsequent cases in which a different result would necessarily have been reached by an application of any of the controlling principles announced as law and controlling the decision in the case at bar. To each of those cases, I think it must be conceded, the material principles of assumed law or some one or more of them announced in the case at bar, were as much or more applicable as to the case at bar, and the principles announced in each of those subsequent cases equally or more applicable to the case at bar. Had they or any one or more of them been applied by the court to this case, this decision would necessarily have been in favor of plaintiffs.

Is not this a *denial* to plaintiffs of the equal protection of the laws?

The State court itself exercised the taxing power,—a power which all courts, including Colorado, concede, is:

> "a legislative function exclusively, and cannot be exercised except in pursuance of legislative authority",—

by *conjecture* as to what under entirely different enactments possibly might have been done or attempted.

Is not this above-quoted principle so essential to a free free government, that for a court, or the State even, acting in its colletive capacity, to disregard it and by one and the same act both make and apply a contrary principle necessarily *denies* due process of law?

The State Supreme Court did this not only in defiance of all its previous decisions, but it decided in substance that the *mere conjecture* that a hearing essential to due process of law possibly may have been afforded as a favor, that an undisclosed possible finding that should but did appear of record in the realms of po ility may have been made, and that it was not in ossible for the city, in another procedure, to have done, but did not do, certain other things, cured and rendered valid the void acts done without jurisdiction to act at all, and the mere *attempt* to do conclusive that all prerequisites to jurisdiction existed, and all things required to be done were done properly, and all this notwithstanding allegations and proof to the contrary.

I contend this law that it is never permissible through the guise of construction, interpretation or other means whatever, to alter plain and unambiguous language, is necessarily, from its very nature, essential to the safety of life, liberty and property, and essential to the maintenance of a republican

form of government itself. It is essential it be enforced by this court in review of State and all other decisions violating it in order to prevent purely *arbitrary* State acts which the 14th Amendment inhibits and was chiefly designed to prevent. I contend that the above law, if not indeed the rule or law of strict construction of grants of *extraordinary* powers to municipalities, and that other law that the jurisdiction of bodies of special *limited* authority must affirmatively appear upon the face of their proceedings, is of universal application in the jurisprudence of these United States and so firmly established by the decisions of this and all other courts, it is properly to be termed a law which no court is at liberty to wilfully violate, and a violation of which by a court to fit the facts in an isolated case is in itself necessarily an *arbitrary* exercise by the State of pure uncontrolled arbitrary will which this court is by the 14th Amendment expressly empowered to prevent. It and the two other rules have been *universally* applied and enforced by this court. Necessarily they have been used more often in upholding than in overturning the decisions of State courts, but this is probably because no other State Supreme court ever attempted to exercise prohibited Czar-like power subordinating the several other declared co-ordinate departments of the State government.

People v. Tool, 35 Colo. 225, 243, 248; s. c., 6 L. R. A. (N. S.) 822.

People v. District Court, 86 Pac. 87, dissent 92 Pac. 958.

People v. Patterson, 35 Pac. 253, dissent 395, s. c., 205 U. S. 454.

City v. Dumars, 33 Colo. 94.
City v. Campbell, 33 Colo. 162.
Jackson v. City, 92 Pac. 690.

I think the decisions of this court show that all three of these legal principles are necessary to prevent a denial of the equal protection of the laws and of due process of law in specific arbitrary confiscations of property by State action, are of univeral application in constitutional republics and in the mother country, and that their legal application have neither never been, or intended to be, confined by this court. (See discussion and cases cited pp. 37 to 40 original brief.)

Galpin v. Page, 18 Wall. 366 373.
Muhlker v. Co., 197 U. S. 544.
Blair v. Chicago, 201 U. S. 400, 463 et seq.
Water Co. v. Hutchison, 207 U. S. 385 and cases cited.
Water Co. v. Freeport, 180 U. S. 610-611.
Sabarego v. Maverick, 124 U. S. 292-4.
Steamship v. Portwardens, 6 Wall. 33-35.
Crandall v. State, 6 Wall. 39.
II Cooley's Story on Constitution (5 Ed.) §§ 1938-1946; 1950-1962.

Judge Cooley, in his chapter on the "14th Amendment," in II Story on the Constitution, *supra*, § 1956, cites several decisions of this court supporting the following text:

> "And in this as well as all other cases in which the owner may be deprived of his

property by proceedings in invitum, the law authorizing such proceedings must be complied with in all essential requirements or the proceedings will be ineffectual. Due process of law requires, first, the legislative act authorizing the appropriation, pointing out *how* it may be made and *how* the compensation shall be assessed; and *secondly*, that the parties or officers proceeding to make the appropriation shall keep within the *authority* conferred, and observe every regulation which the act makes for the protection or in the interest of the property owner, except as he may see fit voluntarily to waive them. The propriety of these rules are too obvious to require any discussion or elucidation."

What does the constitutional guarantee of due process of law and an equal protection of the laws, of a republican form of government, or *any* other constitutional guarantee, indeed amount to if by conclusive conjectural-inference of concededly essential facts proved not to exist or other purely *arbitrary* means it may at will be brushed aside with impunity?

I submit that the power in the case at bar in this manner attempted to be grasped by the State court is as directly prohibited by the 14th Amendment of the SUPREME law of the land as it is visionary and beyond the power of the State in legal existence, and necessarily *arbitrary* and uncontrollable if exercised.

I submit that under the 14th Amendment the decisions of State courts must be governed by *law*, and not like that in the case at bar, even on its very

face purports to be, governed only by inference, conjecture and *arbitrary* judicial confiscation.

Does it lie in the power of the State to grant to any of its departments or directly exercise unrestrained *arbitrary* power? To *alter* the facts? To *confiscate* property? To *decline* to adjudge whether opportunity for hearing was or was not given, merely because to do so would either necessitate a declaring of the assessments void, or subject the holding to the certainty of being reversed in this court?

This court is expressly clothed with the power to prevent any State denying to any person the equal protection of the laws. To perform this duty it is essential this court have the power to prevent State courts from applying the rule of strict construction of the taxing power in one case and itself arbitrarily *make* law when none exists, to fit the facts of another case identical to it so far as the application of the same principle is concerned.

If it be contended that the State court's construction of the laws of taxation by special assessments should be followed, I reply this court has repeatedly said it is only the State court's *settled* constitutional construction of any of its laws which this court follows and not "mere *oscillations* in the course of settlement of questions in State courts."

Gelpeke v. City, 1 Wall. 176, 205.
City v. Mehaffer, 96 U. S. 315.

In the latter case, this court, speaking through Mr. Justice Swayne, said:

> "In (two cases) the same court * * * came to a different conclusion. The ques-

> tion may, therefore, be fairly considered as still *unsettled* in the jurisprudence of the State. Under these circumstances, this court has *always* felt at liberty to follow the guidance of its own judgment."

Whether *oscillations* in Colorado decisions on this subject exist is perhaps best shown by a comparison of some of the decisions themselves, as, for instance, Palmer v. Way, 6 Colo. 106, with Denver v. Knowles, 17 Colo. 204, and that in turn with this case and City v. Campbell, 33 Colo. 162, as to the *source* of the power, and whether it be the police power, the taxing power or a lively imagination; Brown v. Denver, 7 Colo. 305, and the recent case of Jenks v. Stump (Colo.), 93 Pac. 17, with the Campbell, Dumars, Jackson and this case as to the *test* of constitutionality; this case, with the recent case of Bircher v. People (Colo.), 93 Pac. 14, and People v. Sours, 31 Colo. 407, 438, as to the power of the State to *cure by mere conjecture* of what the law *might* be without legislation declaring what it *is;* the Campbell, Jackson, Dumars cases and this case with, for instance, the recent case of Lambert v. Shumway, 36 Colo. 350, and the other cases cited on page 48 of my original brief as to the powers of tribunals of limited statutory jurisdiction to *conclude* by non-recital or ambiguous recital of essential facts in their proceedings; the recent case of City v. Coronado Co., 37 Colo. 235, 246-8, and Holmberg v. People, 31 Colo. 456, with the case at bar as to the effect of evidence proving a supposed conclusive recital was not made. Denver v. Hayes, 28 Colo. 110, with the case at bar as to whether or not a ma-

jority in favor of one kind of paving can be made up by uniting minorities favoring different kinds; Schwed v. Hartwitz, 23 Colo. 187, with the case at bar as to the effect of publishing ordinances in Sunday papers only; Richardson v. City, 17 Colo. 398, and Mitchell v. Town (Colo.), 92 Pac. 678, with Evans v. City, 35 Colo. 490, as to the right to recover money paid on illegal taxation; Evans v. City, 26 Colo. 193; Ry. v. Outcalt, 2 Colo. App. 402, and People v. Sours, 31 Colo. 438, with the case at bar as to the power of the court by fiat to *cure* admittedly void proceedings; Keeze v. Denver, 10 Colo. 112; Becket v. Cuenin, 15 Colo. 284, all the cases cited on page 42 of my original brief, and the recent cases of Cordilla v. City, 34 Colo. 293, Ahern v. Board (Colo.), 89 Pac. 963, with the case at bar as to whether grants of extraordinary powers to municipalities can be based on or upheld by conjectural inference; Goodykoontz v. Acher, 19 Colo. 366, and Killgore v. Cramner, 35 Colo. 487, with City v. Campbell, 33 Colo. 162, and the case at bar as to the power of the court to *construe* unambiguous language; City v. Heath, 38 Colo. 373-8, with the case at bar, the Dumars, Campbell and Jackson cases as to the validity, under the 14th Amendment, of any law or ordinance vesting in officials any *arbitrary* discretion. The above are but a *few* of almost numberless *contradictory* decisions of the State court, and in every above instance the *last* decision of the State court on a given principle is inconsistent with the principles announced in and controlling the decision in the case at bar.

Is "due process of law" being governed by *no* law, *no* certainty, *no* principle, *no* precident?

Can *conjectural* authorization to take, supply the place of legal authorization by due process?

Should this court enforce its oft-repeated rule that it will ordinarily follow and apply the principles of the law as announced in the latest decision of the State court, I think I have shown the Colorado court has since receded from every material controlling principle it announced as law in its opinion in the case at bar. The principles announced in the case at bar are at variance also with every *previous* decision of the Colorado court on a similar point.

Muhlker v. Co , 197 U. S. 544.

The exercise by a State court of fiat to brush aside law and substitute its arbitrary will is not law but more nearly approaches anarchy and revolution, and when it authorizes or permits a taking of life, liberty or property by the State, it is, I submit, directly prohibited by the 14th Amendment of the Federal Constitution. It is authorizing an arbitrary taking by the State without law, instead of government by due process of law.

This court in this case is exercising an *independent* jurisdiction construing the 14th Amendment of the Federal Constitution.

As was aptly held by this court, speaking through Mr. Justice Bradley in Burgess v. Seligman, 107 U. S. 32-33, in no case properly before it for decision is it *bound* to follow State decisions with which it does not approve and even in those cases where the jurisdiction of the Federal courts rests on non-residence only, does so simply as a matter of *comity*. But in cases such as the present, involving the construction of what are the elements of "due process of law" and

an equal protection of the laws under the 14th Amendment, or any other prohibition on the States under the Federal Constitution, it is necessary it exercise its *independent* judgment as to what the elements of the prohibition are. (See cases cited pages 39 & 40 original brief.)

In this connection I contend that applicable *legislation* by the legislative department of the State is an essential element of due process of law under the taxing power, by the 14th Amendment.

In Gifford v. Calloway, 8 Colo. App. 359, the State court said:

> "Legislation directly charging realty with a lien for taxes is a prerequisite to its existence."

In other words, as the above and other Colorado cases elsewhere cited say, the taxing power is a legislative power and cannot exist without legislation.

This court has repeatedly so declared, as for instance in Merriweather v. Garrett, 102 U. S. 472, 501:

> "The power of taxation is *legislative*, and cannot be exercised otherwise than under the authority of the legislature."

In Rees v. City, 19 Wall. 122,—

> "A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, *or even without the authority of law.*"

In Mayor v. Ray, 19 Wall. 475,—

"A municipal corporation is a subordinate branch of the domestic government of a State. It is instituted for public purposes only. * * * The legislature invests it with such powers as it deems adequate to the end to be accomplished. The power of taxation is usually conferred for the purpose of enabling it to raise the necessary funds to carry on the city government and to make such public improvements as it is authorized to make. * * * Such a power does not belong to a municipal corporation as an *incident* of its creation. To be possessed it must be conferred *by legislation*."

Again on page 477,—

"If * * * the power to borrow money and issue bonds or other commercial securities is needed, the legislature may easily confer it under the proper limitations and restraints, and with proper provisions for future repayment. Without such authority it cannot be legally exercised. It is too dangerous a power to be exercised by all municipal bodies indiscriminately, managed as they are by persons whose individual responsibility is not at stake * * * No such power ought to exist, and in our opinion no such power does legally exist, unless conferred by *legislative enactment*, either express or *clearly* implied."

In Heine v. Comrs., 19 Wall. 655, 661,—

> "The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the *legislative* sovereignty, state or national. * * * The power must be derived from the *legislature*."

The province of all courts, as repeatedly stated by this court and recently reiterated in the appropriate language of Mr. Justice Harlan in the case of Admiral Dewey v. U. S., 178 U. S. 521, is

> "to declare the law *as it is*, and not under the guise of interpretation or under the influence of what *may be surmised* to be the policy of the government, so to depart from sound rules of construction as in effect to adjudge that to be law which Congress (or a State legislature) has not enacted as such. Here the language used * * is unambiguous."

In the recent case of Blair v. Chicago, 201 U. S. 400, Mr. Justice Day, for the court, declared courts

> "should so exercise interpretation (when permissible at all) as to bring a sense *out of the words used* and not bring a sense *into* them."

Again, recently and in the case of O'Brien v. Wheelock, 184 U. S. 489, the learned Chief Justice, speaking for this court, held:

> "The courts cannot, by the execution

> of an unconstitutional law as a law, *supply* the want of power in the legislative department."

The difference in application of this last quoted holding to the case at bar is, the State Supreme Court *supplied* not only the application but the unconstitutional enactment as well.

The 14th Amendment is the Supreme Law of the Land. Doctrine of supposed convenience, possible or even probable consequences, *stare decisis* (with the State court the *stare decisis* was the other way) as Chief Justice Fuller in the Income Tax cases declared "should not extend to any decision upon a constitutional question."

Speaking of encroachments on unlimited power by courts in the construction of constitutional provisions, this court in Boyd v. U. S., 116 U. S. 635, approved in Gulf Ry. v. Ellis, 165 U. S. 154, well said:

> "Illegitimate and unconstitutional practices get their first footing in that way. * * This can only be obviated by adhering to the rule that constitutional provisions should be literally construed."

The State court construed the charter provisions as though they read substantially:

Proviso 3 of § 3: No paving shall be ordered unless a petition for the same is first presented subscribed by the owners of a majority of the frontage to be assessed for the same, and if such owners shall by such petition designate the material to be used for

the wearing surface, said material so designated and no other shall be used.

Proviso 8 of § 3: "The board of public works, (a mere limb of the city), it is true, would be without jurisdiction to take the preliminary steps in the absence of such petition, and * * up to the time when the city council (the other limb of the great whole) acts upon their recommendation as to the creation of a paving district and determines that the necessary petition subscribed by the owners has been presented to the board of public works, the latter (the part as well as the whole and the whole as well as the part) could be enjoined from presenting any recommendation to the city council; but there is a stage in the proceedings when the question of the sufficiency of the petition and the number of owners subscribing it is no longer open, if the council in passing the ordinance creating the district has found the facts *from which it can be inferred* that the law *in this respect* has been complied with," and that any *attempt* by the council to make such a finding by ordinance or pass such an ordinance (no matter whether or not the facts from which the inference is drawn are open to any inference whatever, or are ambiguous and open to an opposite inference, or whether or not other record portions of the same proceeding or ordinance show a total failure to acquire jurisdiction and total lack of compliance with any law) shall *on adversary property owners* whose property is to be assessed and who are afforded no opportunity to defend respecting any of the facts, be conclusive *of its own validity* as a finding *of jurisdiction*, and of *full compliance with the law* up to the period the finding is attempted and claimed to be

made, and if the statute itself is not sufficiently broad to cover said matters, we the State Supreme Court will so legislate it. (Opinion, pages 108 & 109.)

City v. Dumars, 33 Colo. 99.
City v. Campbell, 33 Colo. 163.
Jackson v. City, (Colo.) 92 Pac. 690.

The State court concedes a majority petition or a finding of the council by ordinance there was a majority petition first presented is essential to jurisdiction to act at all. It is conceded there was no such petition and conceded there was no finding by the council by ordinance there was one. On page 108 of its opinion it says:

> "In the ordinance creating the paving district the city council did find, as a fact, that petitionS for paving the street subscribed by the owners of a majority of the frontage to be assessed for paving the street in the paving district, were presented to the board of public works."

The State court, to obviate this lack of "A" petition *itself* subscribed by the owners of a majority of the frontage, first conjecturally inferred as a conclusion of law that because the council in the alleged but really void creating ordinance *recited* (it does not even purport to find) that "certain petitionS" (plural) for different kinds of paving were first presented, that the council had found the essential fact that A petition for paving with Bermudez asphalt itself subscribed by the required majority of property owners was presented, and declared this

conjecture *conclusive;* as the law says the finding must be by ordinance from its first conjectural inference there had been a finding not by ordinance and the fact the city had attempted to act the court *conclusively* presumed there was a valid finding by valid ordinance; as the law did not say the above alone was enough, from this purely conjectural inference the court *conclusively* presumed that everything essential or made by the law essential to jurisdiction in the city to pave existed; from this purely conjectural inference *conclusively* presumed the mere recital concluded not only the city making the recital, but adversary property owners, without opportunity for hearing, as well; from this conjectural inference *conclusively* presumed the legislature had provided that all these conjectures by the city council and itself should be *conclusive* on the Supreme Court of the United States and "every other court or other tribunal,"—notwithstanding evidence was introduced in proof of the specific allegations of the complaint that the facts were contrary to each and every one of the conjectural inferences.

When it came to § 31, by pure conjecture directly contrary to the allegations and proof the State Supreme Court *conclusively* inferred a sufficient hearing was afforded because such a hearing was necessary to prevent the assessment violating the 14th Amendment; and then, after conceding that the charter assessment provisions (if conducted in strict accordance with the unambiguous language of the charter § 31 would violate the 14th Amendment), by conjectural inference *conclusively* presumed they did not provide what they clearly said, but as it arbitrarily *altered* them to read. It was careful to make

all its conjectures *conclusive* regardless of what was or might possibly be the proof, so reversed the case with directions for judgment in accordance with its conjectures. (See original brief pp. 165-170; 43-61.)

The language of this court in reversing the case of U. S. v. Ross, 92 U. S. 281, is instructive on the *conjectural* powers of courts and in full accord with the State decisions cited on page 53 of my original brief. On page 283 of that opinion this court, speaking through Mr. Justice Strong, says:

> "Such were the facts found; and from them the court deduced, not as a conclusion of fact, but as a presumption of law * * * (certain other facts). It is obvious this presumption could have been made only by piling inference upon inference, and presumption upon presumption * * *. These seem to us to be nothing more than *conjectures*. They are not legitimate inferences, even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissable. *No inference of fact or of law is reliable, drawn from premises which are uncertain.* Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

After quoting from Starkie on Evidence and

from Best on Evidence, the opinion on page 284 proceeds:

> "The law requires an open, visable connection between the principal and elementary facts and the deductions from them, and *does not permit a decision to be made on remote inferences.* The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption, *but it does not supply proof of a substantive fact.* Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

Sabariejo v. Maverick, 124 U. S. 261, 284-95.

U. S. v. Carr, 132 U. S. 653-4.

See cases cited in Original Brief, pp. 48, 49, 50.

The whole basis of the opinion of the State court upholding these assessments in the case at bar is pure arbitrary *conjecture* based on another *conjecture* of law and facts, declared not by the law but by the court to create a *conclusive* presumption of law and fact from a mere *attempt* to do instead of the essential law and facts essential to jurisdiction to make a valid assessment.

In response to the quotation from charter § 47 on page 29 of counsels' brief, all I think that need be said is, this only permits of complaints to the works board "that the improvement is not being

constructed in accordance with the contract." The board and city here, or at any later stage, has no power to consider or pass upon the really material question as to the power and jurisdiction of the city to act at all, nor are any hearings so essential to due process of law provided for or required, and the decision of the board as to whether or not the work is being done in accordance with the contract is made final and authorized and permitted to be purely *arbitrary* without any process of law whatever.

By the express holding of the State court in the opinion the question of the jurisdiction of the city to act at all is "no longer open" after the passage of a void creating ordinance from which, *only by pure conjecture*, it possibly "can be inferred" facts essential to jurisdiction may (or may not) have existed.

In addition the trial court found, as the complaint alleged (p. 13) that plaintiffs had no notice or knowledge of the ordering or construction of the paving, and that plaintiffs "did not have any notice or knowledge of any publication or notice, matter or thing herein alleged, *until* about the time of protesting against the assessment, as hereinafter set forth."

I am glad to see that counsel on page 30 of their brief admit the force of my original argument by conceding to quote their own language, that

> "In the case at bar, as in all cases of paving of streets under the charter, *there is no discretion*, lodged in the city council or in the board of public works in the matter of making the assessment, because the charter itself prescribes the rule or method

> of apportionment, viz., by frontage, and it is only a matter of mathematical calculation on the part of the board of public works and the city council sitting as a board of equalization in ascertaining the amount to be assessed against each lot in the district."

i. e., that the only possible objection which, under the charter the council in the assessment is entitled to consider at all is the single one that the works board's mathematical calculations are not in accordance with the rules of arithmetic.

And again, on page 37:

> "It (the city council) had nothing to do wit the attack on constitutional grounds or on irregularity of proceedings. Its duty was (only) *to equalize* the assessment, if possible."

Not only was the city wholly without jurisdiction to make this assessment by reason of failure to obtain jurisdiction to act at all, but the assessment itself, so far as it confiscated property, was a *disregard* of law both State and national and a *pure confiscation of* property, usurpation and abuse of the taxing power and of all power granted or possible to be granted. The State Supreme court, by its decision reversing the case with directions for judgment necessarily in effect said "no defense whatever to confiscatory assessments can be pleaded or shown, and if shown is immaterial."

Can it be possible that the State, under the 14th Amendment, while it cannot by statute *directly* say that the title to the 4x125 foot strips and the other

almost as narrow strips of land shall be taken from Mr. Londoner and Mr. Sheedy and vested in the State, that yet it has the power *indirectly* with or without any statutory authority applicable, to fix upon them a charge so enormously in excess of their total value, present or prospective, either before or after the attaching of the alleged lien, that identically the same confiscatory result is accomplished? I do not think so, and that is one of the several legal propositions which I submit for the careful consideration of this court.

A State cannot do by mis-direction what it is expressly prohibited by the 14th Amendment from doing directly, and this court and the Colorado court have both repeatedly declared that "courts are not bound by forms, nor are they to be mis-lead by mere pretenses."

I cannot agree with counsels' statement on pages 36 to 38 of his brief that the plaintiffs in error filed no objections to the proposed apportionment as contemplated by the charter, for the record (15 and 37) show directly the contrary. Even had the council considered any of the objections filed *so far as the apportionment was concerned* too general, they were bound to give the objectors notice of when and where to be heard on the council's contemplated action on the objections filed if not indeed opportunity to make them more specific, as the property owners intended doing by evidence and testimony had they been permitted a hearing. They could not, even if insufficient, in effect strike them from the files *without notice* and opportunity to defend against the proposed action.

Davidson v. City, 178 Ill. 582.
Weir v. Bradford, 1 Colo. 16.
Cleveland v. Co., 38 Colo. 194 5.

But as defendants *concede* the power of the council is limited to a correction of mere arithmatical miscalculations in apportioning the charge by the front foot per lot apportionment, (and I concede the apportionment was so made), the valid and concededly sufficient objections filed by plaintiffs to the *jurisdiction* of the city to act at all under the law were necessarily immaterial, and the act therefore unconstitutional in violation of the 14th Amendment because failing to permit a *lack of jurisdiction* to act at all being shown.

But as the rule of front foot per lot apportionment itself in effect becomes not merely a *prima facie* but a rule in effect *conclusive* of its own validity, it is necessarily in violation of the 14th Amendment as *authorizing* and *permitting* a confiscatory assessment upon only corner lots and property *abutting* upon the improvement which may be as in the case at bar of less value than the confiscatory charge itself.

Charter § 31, and § 4 to which as construed it refers, imperatively declare that the cost of the improvement *must* be assessed by frontage "*upon all the lots and lands abutting* on the street improved in proportion as the frontage of each lot or tract of land is to the frontage of all lots and lands so improved, the sides of corner lots which sides abut on the street so improved being regarded as frontage."

No assessment (except under § 5 for the comparatively insignificant cost of paving the street the

intersection) is permitted against lots not *abutting* on the street improved.

So, when it chances, as in the case at bar (Abst. fols. 22 & 23), that the city has permitted property to be platted so that it has a large frontage on the street later improved and but a few feet or few inches it might be, of width, the entire cost of the improvement opposite that frontage is required to be placed upon it (and the lot opposite it across the street improved,) and no portion whatever of the cost of the improvement (except, of course, its proportion of ⅛ of the cost of improving the intersection) is, or can under the charter, be assessed against the lot 4 inches (in the case at bar 4 feet) or any other distance back of and not *abutting* on the street improved. And this regardless of whether or not as, for instance, in the case at bar, the city, by widening the street, has, in the past, by condemnation, taken from plaintiffs the greater portion of the lot or lots formerly owned by them (paying them for but the portion taken instead of for the full lots) and left them the owners of but a mere strip of land but four feet, or even may be but a fraction of a foot or of an inch in width which is required by the assessment or any assessment if in compliance with the charter the entire cost of asphalt paving in front of it,—a paving, by the way, regardless of cost, absolutely unfit for and owing to the noise and dust, etc., a real injury instead of a benefit to suburban *residence* districts such as that in the case at bar.

By § 4 as well as by § 31, it is only the *works board* that can authorize or permit an assessment to a "substantially equal depth," and even the works board, by the express terms of the charter, have this

power only "where the real estate abutting on the street improved consists of lots or lands which are not of substantially equal depth," and the assessment must be only on the *abutting* lots and lands.

No hearing whatever upon the *apportionment* (as the opinion concedes) is authorized, permitted or required before the works board, and if it is said board that has the power to affix the charge the court *concedes* the assessment is void.

Defendants concede the powers of the city council to be confined to mathematical corrections of the works board's apportionment. Any hearings the council might grant as a favor on any other matters would, if granted at all, necessarily be a mere formality *before a body powerless* (without a violation of the only power it possessed) *to grant any proper relief*, or relief at all, from the arbitrary rule of assessment *conclusively* fixed by the legislature.

No power is given by the State to the city to make any assessment on property in the alleged district for local improvements in any other manner. As the *mode* of exercise authorized must be conceded to be the *measure* of the power possessed, an assessment in any other *mode* would be unauthorized, *ultra vires* and void.

As I have clearly shown in my original brief, pages 125 to 163, what possible useful purpose could the granting of the favor of a hearing serve, when as counsel concedes, the assessments, if made in accordance with the only manner authorized by the charter, necessarily must result in the confiscation of property such as the lots of these several plaintiffs? The city, after negligently issuing the bonds, is bound and could be, under its charter compelled by

the bondholders, to make the confiscatory assessments. (Original Brief, 144-147.)

It may be conceded, as this court in French v. Barber Co., in substance declared, that the front foot rule of assessment is not *necessarily* invalid but *prima facie* valid where the lots are of equal depth and all have an equal frontage on the street improved, but as this court also in substance says on page 345 of that case, where the authorities deriving their only power from the State so construe the law as this case well illustrates, as to refuse relief (i. e., regardless of the depth of the lots, makes the front foot assessment per lot frontage rule conclusive and in effect close the courts) to those whose property *is* confiscated by that rule of assessment, a violation of the 14th Amendment necessarily results. As no power is granted the city to assess for such improvements, except by the front foot lot frontage rule, any attempt at assessment in violation of the only power granted would necessarily be *ultra vires* and void.

Norwood v. Baker, 172 U. S. 278.
Also, see Original Brief, pp. 152-165.

It would necessarily be an *arbitrary* act without law to sustain it.

It was specifically alleged and proven (15 & 21) that the so-called meeting of the council was "without the notice or knowledge of any of plaintiffs" in denial of their right to an opportunity to be heard, and (p. 23) "that by the said assessment it is attempted to take, injure and confiscate the property of each of the plaintiffs herein in violation of * *

* Article 14 of the Amendments of the Constitution of the United States, which denies to the State of Colorado, or any body or municipality existing under authority attempted to be conferred by said State, the right to make or enforce any law * * * which shall deprive any person of * * * property without due process of law."

See original brief, pages 127-129 and 137-165.

Having filed proper objections at least to the jurisdiction of the city to act at all and also objections as to the amount of the apportionment, plaintiffs were certainly justified in assuming their objection would not be passed upon in secret "without their notice or knowledge" at a special meeting of the council, and in waiting for the time when they assumed they would be given notice of the time and place for hearings on the objections filed.

The material assessment provisions of Charter Article 7 were construed by the State Supreme Court as though they read substantially as follows:

> § 1: "The city shall have power to contract for and make local improvements and to assess the cost thereof upon the property specially benefited, *as hereinafter provided only*."

§§ 4 & 5: Assessments shall be made as provided by these sections only by the arbitrary front foot per lot rule.

§§ 29-31: No notice of the time or place of assessment for hearing property owners need be afforded, because if afforded no relief could be granted except as to arithmatical miscalculations in the ap-

portionment, and it is immaterial whether or not any opportunity for hearing property owners on arithmatical miscalculations be afforded, provided only it be *possible* in some other cases for such an opportunity to be afforded as a matter of *favor* merely on arithmatical miscalculations.

> "If the provisions of § 31 are objectionable (in violation of the 14th Amendment) because apparently mandatory upon the city", they may be changed to permissive to fit the facts of the particular case, "if a contrary construction would render it obnoxious to constitutional inhibition". (Opinion, p. 117.)

"It is argued by counsel for appellees that the charter provisions (as well also as these particular alleged assessments) are unconstitutional because they do not provide for notice of the time and place when they may be heard on such questions as it would be proper for the city authorities to consider before their property is assessed with the expense of a local improvement. Section 30 * * * is sufficient notice to owners *to file* their complaints and objection within a specified time. Whether or not the charter should further specifically provide for a notice to owners filing complaints and objections of the time and place when such complaints and objections would be heard, is *the* important question. If they are entitled to such notice *(a point, however, which we do not decide)*," the charter is not necessarily unconstitutional if it may be *conjectured it might* be given as a matter of favor. (Denver v.

Dumars, 33 Colo., op. 98, referred to in and made a part of this opinion.)

It certainly seems to me it is going outside of all legitimate bounds to expressly *decline* (as did the State court) to decide whether or not the necessarily *essential* notice of time and place was or was not given in the case at bar, and by a reversal, *with directions* for judgment upholding the assessments to in effect declare it is immaterial whether or not any opportunity to be heard or defend be afforded before the council on the question of the apportionment, and that especially in a case where the trial court expressly found each of the plaintiffs' properties was confiscated and the State Supreme Court expressly states that all along 8th avenue (including plaintiff's 4 feet wide), "strips varying from 4 to 19 feet in width were assessed for paving as much as $1,000" when the allegations and evidence showed that even after the paving they were, at the very outside, worth not to exceed $25 each, and *full* lots worth but from $200 to $500 each. Complaint, pp. 22 & 23; evidence, pp. 46-48).

Chin Yow v. U. S., 207 U. S. 201.

C. B. & Q. Ry. v. Comms., 200 U. S. 561, 580-1.

When one considers that the grant of power to the city (the only power it possessed) was that "The City shall have power to contract for and make local *improvements*, and to assess the cost thereof upon the property specially benefited, *as hereinafter provided*" and in no other manner, it does seem to me that charter provisions which *authorize*, without a violation of the charter, an assessment, such as this, made

without such notice by which only could be afforded the only opportunity to defend, *authorize* if, indeed, they do not (as I think I have shown they clearly do) necessarily require an *arbitrary* taking without due process of law in violation of the 14th Amendment.

See pages 162-165 and 120-162 original brief.

Lesere v. Rocherean, 17 Wall. 437, 439.

I do not think I have mis-stated or over-stated the *substance* of the State Supreme Court's construction (or legislation) of the charter provisions. Is it not clear they come clearly within the repeated definitions of this court of the 14th Amendment as an inhibition equally binding on the executive, legislative and judicial departments of the State against

> "the *arbitrary* exercise of the powers of government, unrestrained by the established principles of private right and distributive justice."

See authorities original brief pp. 171-187; 39-40.

The truly great Justice Caswell, speaking for the entire court en banc, just prior to his lamentable death, left as almost the last of his uniformly able opinions, that in Jenks v. Stump, (Colo.) 93 Pac. 17. The suit was replevin by Stump. Jenks as agent of the Humane Society took possession of certain stray cows and sold the same in full compliance with and under the provision of a statute providing for the taking possession and giving a lien for the expenses of feeding of abandoned animals and sale of same for the satisfaction of the lien, "at public auction, upon giving written notice to the

owner, if he be known, of the time and place of such sale at least 5 days previous thereto," and if the owner be unknown by posting such notices. Beginning on page 18 the learned jurist said:

> "The important question presented and chiefly relied upon in the argument is whether the law as it stands contravenes section 25 art. 2 Colo. Constitution and the 14th Amendment to the Constitution of the United States, in that it deprives plaintiff of his property and the possession thereof, without due process of law. This phrase has been frequently discussed in this court, and many other courts have defined it in various ways." (quoting exhaustively from the decisions) * * * "The court in the same case (Brown v. Denver) further says: 'A valid assessment cannot be made under an invalid law or ordinance, and its constitutianality is to be tested, not by what has been done under it, but by what it authorizes to be done by virtue of its provisions.' Stewart v. Palmer, 74 N. Y. 183; Thomas v. Gain, 35 Mich. 155; Davidson v. New Orleans, 96 U. S. 97; San Mateo v. S. P. R. R. Co., 13 Fed. 722. In the latter case this court had under consideration the validity of a statute authorizing the construction of sidewalks; but it was held in that case, as in other cases, that an assessment of that character could not be upheld as a police regulation, and the court was then discussing the police power of the State. Subsequently this theory of taxation was overruled (Denver v. Knowles, 17 Colo. 204), but such later decision in no wise detracts from

the force of the argument of the court as to legislative enactments concerning the exercise of police powers. In Brophy v. Hyatt, 10 Colo. 223, the court having under consideration the power of towns, incorporated under the statute, to declare what should be a nuisance and to abate the same, etc., says: 'The ordinance does not strictly speaking declare or work a forfeiture of impounded animals, since it provides for the payment of the proceeds of the sale to the owner after deducting the cost of the proceeding.' Conversely it is true that a statute *which does not provide* for the payment of the balance to the owner after deducting the cost of the proceeding does work a forfeiture. It is not a sufficient answer to this proposition to say that the balance of the proceeds of the sale of animals remaining after deducting the cost for keeping and the cost of the proceedings and sale can be recovered by the owner in an action, because the constitutionality of the statute must be determined by what it authorizes to be done by virtue of its provisions. Brown v. City of Denver, *supra*, and cases cited; Ames v. People ex rel., 26 Colo. 83, 109.

"Applying the foregoing well-established principles to the case at bar, we find the statute seeks to clothe the humane society and its agents with extraordinary powers. By its terms the agent is the sole judge of whether an animal is neglected, abandoned, or ill treated, and whether it has sufficient food, nourishment and shelter. The truth respecting the matter cannot avail, because the agent is clothed with power to take possession of the animals, regardless of their

condition. No tribunal or any hearing *is provided* to determine the facts. The agent *may in his discretion* take possession and create a charge which becomes a lien upon the property without notice or hearing. The owner *may* have no knowledge that his property has been taken. No provision *is made* for the payment of any residue over and above the charges of the agent and the expense of the sale to the owner, and such payment *is not required* by this law, and this is one of the tests of its constitutionality. There is no penalty for failure to return the proceeds of any sale to the owner, and the only redress is by an action to recover the same, and the party aggrieved must himself initiate the action to have his day in court. We think such powers are inhibited by the Constitution, and must hold that the statute is in contravention of article 2, section 25, Const. Colo., and of the fourteenth amendment to the federal constitution, that it authorizes the taking of property without due process of law, and is not a valid exercise of the police power of the State."

The above is the very latest statement by the State court of the test of constitutionality and I consider its application to the case at bar especially appropriate.

In the Paulsen, Gilmore and Gatch cases the power granted the city to assess was a *general* grant, not like that in the case at bar, a *specific* power to be exercised only in the specified manner "*as hereinafter provided.*"

The charter provisions do not *require* any oppor-

tunity to defend to be afforded. The exercise of the grant of the only power possessed by the city, is by Charter § 1 of Article 7 expressly limited to a procedure "*as hereinafter provided.*" By virtue of (though not in accordance with) the "hereinafter provided" provisions of the charter the property of the citizen, without any deviation from the charter provisions, not only *may*, but, as in the case at bar, actually *was*, taken without any opportunity to defend. The State court construed proviso "Eighth" as authorizing the council to make a *ex parte* finding "conclusive in every court or other tribunal"—conclusive of its own validity and of the right, power and jurisdiction of the city to affix the confiscatory charge, and construed §§ 29 to 31 as *not requiring* but merely *permitting* an opportunity to defend, as a mere matter of favor to be afforded.

I consider the principles of the above decision as conclusive of this case, for it would certainly amount to a denial of the equal protection of the laws to apply such a rule in one assessment or similar case and refuse to apply it to another substantially identical to it, so far as the question of the applicability of the principle is concerned. For a State court to either permit, cause or make such *arbitrary* discrimination, is, I submit, to deny the equal protection of the laws prohibited by the 14th Amendment.

Yick Wo v. Hopkins, 118 U. S. 356.
Hovey v. Elliott, 167 U. S. 409.
Cotting v. Stock Yards, 183 U. S. 100.
School v. McAnnulty, 187 U. S. 94.
Gulf Ry. v. Ellis, 165 U. S. 150, 155-9.

Guthrie, 14th Amendment, 22 *et seq.*

Judson, Taxation, §§ 311-313, 315, 434-6, 462.

Brannon, 14th Amendment, pp. 315-323.

The 14th Amendment is an express prohibition against any *arbitrary* State action and is expressly worded so that no State shall in any manner either (1) "*Make or enforce* any law which shall abridge the privileges or immunities of citizens of the United States" (of which the privilege and immunity of not having his property taken without due process of law is one), nor (2) "shall any State *deprive* any person of life, liberty or property without due process of law."

II Cooley's Story on Constitution, § 1934.

The later prohibition is directed against State action of all kinds. The first is a prohibition, among other things, of an *arbitrary* taking expressly authorized by legislative enactment, *while* the record is an express prohibition of an *arbitrary* taking by the State *without* legislative enactment. It is, among other things, an express prohibition against judicial *legislation*, pure and simple.

The intent, claim or pretense by which the taking by the State is accomplished, and whether claimed to have been, or claimed not to have been, authorized by law, is immaterial.

Houston Co. v. Mayes, 201 U. S. 330.
W. Chicago Ry. v. City, 201 U. S. 506.
State v. Barber, 136 U. S. 313, 319-30.

Brinner v. Rebnican, 138 U. S. 78, 81.
Also cases cited pages 39-40 original brief.

I confidently submit that by the 14th Amendment the authority in plain and unambiguous language is unquestionably conferred on this Supreme tribunal to prevent any and all purely *arbitrary* State action.

I further submit, as this court has repeatedly declared, that "due process of law" by the 14th Amendment is necessarily the opposite (is indeed justly termed the antinomy) of *arbitrary* State action of all kinds.

It is not in the power of a State to *arbitrarily* confiscate any property of any person. As stated by Chief Justice Fuller in re Kennuler, 136 U. S. 448, "Undoubtedly the amendment forbids *any* arbitrary deprivation of life, liberty or property."

It is neither in the province nor the power of the State or its court or other agencies to declare substantially in the language of Louis XVI: "I am the Nation" and anything that I (or we) do, however *arbitrary*, unauthorized by or in direct violation of all law, *is* law.

Whenever the only right of a State to take property is so visionary it can only be founded on *conjectural inference* it is necessarily so arbitrary it does not exist because prohibited by the 14th Amendment inhibition against all purely *arbitrary* State action.

As the State court has construed these charter provisions to read, it has clothed the State, through itself, with an *arbitrary* uncontrolled power to substitute *will* and *conjectural inference* for law and jurisdictional facts, in assessment cases. To other

and later exercises of the taxing power, the State court applies the general established rule of *strict* construction, thereby, but emphasizing the even otherwise very apparent fact it is in this case depriving the plaintiffs in error of the equal protection of the laws.

In Henderson v. Mayor, 92 U. S. 268, this court said:

> "In whatever language a statute may be framed (or construed), its purpose (constitutionality) must be determined by its natural and reasonable effect."

In Chy Lung v. Freeman, 92 U. S. 278,

> "we are at liberty to look to the *effect* of a statute for the *test* of its constitutionality."

The *effect* of this statute, as construed by the State Supreme court, is apparent. It is to vest a purely *arbitrary* unjust power to take property by *conjecture* and mere *will* without regard to and in violation of law.

> II Cooley's Story on Constitution (5th ed.), §§ 1938, *et seq;* 1956, 1968.

By reason of the fact I had the earlier portions of my original brief printed before preparing the later portions, it may be that I have not in my original brief stated in chronological order all of my federal questions at any one place in my original brief. But I am quite sure a reading of that brief will disclose that I have gotten them all in, and I cannot see how counsel could have misconceived that the fed-

eral questions which I raised are as stated by him on page 10 of his brief. Some of my federal questions are stated on pages 36 and 37 of my original brief, and the others elsewhere as the point is argued. I certainly endeavored to state my points with clearness and accuracy, but for the convenience of the court and that it may not be assumed my federal questions are as stated by counsel, I will endeavor, though in somewhat altered language, to enumerate in one place the substance of the federal questions which I have in my original brief heretofore argued and relied upon, so that upon the oral argument there can be no misunderstanding as to just what are the

Federal Questions Involved.

First: That the Colorado Supreme Court, acting for the State, concedes that these alleged assessments against the properties of the several plaintiffs in error were absolutely void and the city wholly without jurisdiction in the premises except for proviso "8," § 3, article 7 of the charter, and further that said court necessarily in fact concedes that said proviso, read in its plain and unambiguous language *as the legislature enacted it*, had not and could not have any application whatever to this case; that to uphold the void assessments it was necessary for the court to, and acting for the State it did, in fact so construe or legislate said proviso as to *alter* its unambiguous language as the legislature had enacted it, and entirely changed the sense and meaning of same, arbitrarily forcing it to read or mean, in substance, that it was not necessary for the city council to comply with the law, or make any investigation what-

ever or afford any opportunity at all for property owners to be heard before the council, before making the so-called conclusive finding which would prevent resort to the courts, if by the purest sort of conjecture it in any way "can be inferred" from ambiguous facts, or lack of facts, not in accordance with or bearing any necessary, proper, or even possible relation to the facts required by the proviso as the legislature enacted it to be found, that is sufficient and arbitrarily made it *conclusive on adversary property owners* of not only the facts required to be found, but also (1) of the validity and existence of the finding required to be made, (2) that it was a finding in fact and made in accordance with the authorization, (3) that it was a valid finding validly made by ordinance in a valid ordinance, and not a mere recital in a void ordinance, (4) that the attempt to make it is conclusive of its own validity, (5) conclusive that the city possessed jurisdiction to act as it attempted, and (7) that the law, up to and including that point at least, had been *fully* complied with, and this regardless of whatever else the same record might show or property owners claimed to have been assessed might offer, attempt or in court actually, as in the case at bar, prove and the court find,—all in violation of the 14th Amendment of the Supreme law of the country, which declares "nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Second: That the 1893 Charter of the City of Denver, Colorado, and particularly proviso "8," and the assessment sections of article 7 thereof, was by the Colorado Supreme Court acting for said State in

violation of the due process of law required by the 14th Amendment of the Federal Constitution reconstructed, construed and applied as authorizing a taking of the property of each of the plaintiffs in error who were afforded no opportunity to defend before the body making the conclusive recital, by an ex parte ambiguous recital of ambiguous claimed facts from which no conclusive inference or inference at all as to compliance with the law or any of the essential portions thereof is either necessary, permissible or legally possible and from which if inference or conjecture *is* indulged in, it either can or cannot, equally as desired, be conjectured or not conjectured, equally as desired, that the law either has or has not, equally as desired, been partially complied with, which ambiguous recital of facts or claimed facts as the said court construed said proviso as construed may be and actually was construed only in a void ordinance, may be contradictory of itself or themselves and contradicted other recitals in the same record and in other record portions of the same proceeding showing a total want of and failure to obtain jurisdiction to act at all and failure of compliance with the law, and (without any declaration by the State declaring the same conclusive of anything), construed the same conclusive on these plaintiffs in error of its own validity, of jurisdiction and of full compliance with the law and as conclusively authorizing the fixing of a charge against the property by which it could be and was taken.

Third: That the State Supreme Court, acting for the State, misinterpreted the 14th Amendment of the Federal Constitution and misconceived the scope of same in that they misconceived their powers there-

under in the exercise of the judicial function and conceived it to be their function to arbitrarily alter ambiguous legislation and make law to fit the facts of a particular case where no legislative enactment applicable to such facts existed upholding or authorizing the taking or affixing of the confiscatory charge in the manner attempted.

In other words, my first three federal questions are in substance based upon the contention that the term "due process of law" in the 14th Amendment means that the taking must be authorized by something more than *arbitrary* conjecture, will or desire, to authorize and cover the acts done or attempted by the State acting either through one of its subordinate municipal bodies or through its Supreme court. (This same federal question is stated more at length on pages 36 to 40, and discussed at pages 165 to 222 of my original brief).

Fourth: That the Colorado Supreme Court, acting for the State in the construction which it placed upon said proviso "8" as the legislature enacted it, construed the proviso in such a manner that had it been enacted by the State legislature itself in the language as the court legislated or construed it to read or mean, and had it been applied as the State court applied it to these confiscatory claimed assessments, it would have been beyond the power of the State to enact and the alleged assessments void as in violation of the above quoted due process of law clause of the 14th Amendment, because it substituted pure unsupported imagination and arbitrary uncontrolled conjecture for essential law and essential facts essential by the provisions of said 14th Amendmend to the making of any valid municipal assess-

ment for local improvements. (Original brief pages 36 & 37 and 165 to 222.)

Fifth: That the proviso "8" as the Colorado Supreme Court acting for the State construed or legislated it to mean authorized and, as applied by said court in this case to these alleged assessments, constituted a taking by the State of the property of each of the plaintiffs in error without due process of law and a denial to each of them of the equal protection of the laws in violation of the 14th Amendment of the Federal Constitution in that it is beyond the power of the State to make its own or any of its agencies mere *claim* that it or they had complied with and that there, in fact, existed everything essential and everything that by its own existing-unrepealed-and-only-applicable-legislation was declared essential to the making of a conclusive finding on a question of pure fact conclusive on adversary property owners whose property is by the claim of finding to be and cannot lawfully otherwise be conclusively subjected to the right to make the charge without opportunity to defend.

In other words, that it is beyond the power of the State to *alter* or authorize the altering by mere claim or recital of facts essential, or by the State declared and conceded to be essential, to any action by any of its agencies and in nowise involving any discretion in the agent.

The above point can be more clearly expressed by an illustration. An applicable illustration was stated on page 68 of my original brief. I will give another. With the same charter provisions in force, and in no way attempting to *dispense* with their requirements, would it be due process of law under the

14th Amendment, without affording opportunity for hearings for the State to attempt to conclusively declare "A petition for said paving subscribed by the owners of a majority of the frontage to be assessed was presented prior to any action by the authorities of the city of Denver in the matter of the Eighth Avenue Paving District No. 1?" If so the powers of a State border closely on the supernatural. (See argument and authorities pages 66 to 112 and 116 to 122 original brief.)

I think I state the facts fairly when I say, the position of the State court in the case at bar when carefully analyzed in substance is that these assessments are valid not because they *are* provided for or authorized by law, but because, as the court states, it thinks it can conjecturally infer they possibly *might* have been provided for by entirely *different* legislation and procedure.

A similar position was assumed by counsel for the government in the celebrated Income Tax cases (Pollock v. Farmer Co., 157 U. S. 600), which position was met by the opinion of Mr. Justice Field in the following words:

> "There was another position taken and that is, that if this court shall declare that the exemptions and exceptions from taxation extended to the various corporations mentioned * * * violate the requirements of uniformity and are therefore void, the tax as to such corporations can be enforced, and that the law will stand as though the exemptions had never been inserted. *This position does not*, in my judgment,

rest upon any solid foundation of law or principle. The abrogation or repeal of an unconstitutional or illegal provision does not operate to *create* and give force to any enactment or part of an enactment which Congress has not sanctioned and promulgated * * * The position here taken (is) that exempted things can be taxed by striking out their exemption. If the exceptions are stricken out (or, as in the case at bar, the court fails to enforce the statute in the language and form enacted) *there is nothing to be assessed and collected* except what Congress has otherwise affirmatively ordered. *Nothing less can have the force of law.* This court is impotent to pass any law on the subject. It has no legislative power. The court, by declaring the exemptions invalid cannot, by any conceiveable ingenuity, give operative force as enacting clauses to the exempting provising provisions. This result is not within the power of man."

As I read the opinions in the Income Tax cases, none of the Justices of this court questioned the foregoing principle.

Sixth: That the Colorado Supreme court, acting for the State, by the construction which it placed upon said proviso "8", exceeded the powers of the State and deprived each of the plaintiffs of his property without due process of law in violation of the 14th Amendment of the Federal Constitution, in that it construed the same as permitting void action conceded to be without jurisdiction, to be cured, not by

an authorized finding by ordinance as authorized, but by *conjecture* that the State, through its agency, the City Council, in the so-called but really void recital or alleged finding, had found by ordinance essential facts required to be found by and to appear on the face of the ordinance, which the undisputed evidence proved, and the alleged ordinance itself showed had never been found in the only manner authorized to be found, or found at all, and held said conjecture conclusive of its own validity, and of all the law and facts conjectured.

Seventh: That the Colorado Supreme court, acting for the State, by the construction which it placed upon said proviso "8", in its decision in the case at bar, exceeded the powers of the State and deprived each of the plaintiffs in error of their property without due process of law, and denied them the equal protection of the laws, in violation of the 14th Amendment of the Federal Constitution in that without legislative enactment so providing it, construed said proviso as permitting the void action or attempt at action of the State, acting through its agency, the City of Denver, to be conclusive of jurisdiction to order, make and assess the cost of the alleged improvement against the said property, in violation of all its other decisions, past and future, on like or similar subjects.

Eighth: That the Colorado Supreme court, acting for the State, by the construction which it placed upon said proviso 8 and said charter, in its decision in the case at bar, exceeded the powers of the State, and deprived each of the plaintiffs in error of his property without due process of law in vio-

lation of said 14th Amendment of the Federal Constitution in that it construed the same as permitting a taking of the property by the unauthorized and void action of the State, through its agency, and without legislative enactment so providing, declared such act conclusive, not only on the State acting through its said agency, but conclusive on adversary property owners, who were afforded no opportunity to be heard, of full compliance with the law.

Ninth: That the Colorado Supreme Court misconceived its functions as a court and the powers of the State, in that, in construing the assessment provisions of the city charter and particularly § 31 of article 7 thereof, it arbitrarily altered the plain and unambiguous unconstitutional language of the State to fit the facts of a particular case by altering the mandatory word "shall" to the permissive word "may," thereby attempting in excess of its power to confer upon the city council as an agency of the State in the manner attempted be granted by the State, which mandatory word "shall" was expressly stated by the court to be changed to the permissive word "may" merely because and for no other reason than that otherwise and except for such alteration it concedes the procedure and law would authorize a taking by the State of property without due process of law in violation of the requirement of the 14th Amendment of the Federal Constitution.

Tenth: That § 31 of the assessment provisions of said city charter, whether the same be read as enacted by the Colorado Legislature or as construed by the Colorado Supreme Court, is in violation of the 14th Amendment of the Federal Constitution in that

the assessment, if made, was required to be by the arbitrary front foot rule, which in the case at bar necessitates the confiscation of the property of plaintiffs in error and permits of no other method of assessment.

Eleventh: That the assessment provisions of the 1893 charter of the City of Denver are in violation of the 14th Amendment of the Federal Constitution in that they authorize a taking by the State of the property of plaintiffs without due process of law, without requiring the affording owners any sufficient opportunity to be heard in the making of the alleged assessment before any board or body competent to legally grant proper relief.

Twelfth: That the Colorado Supreme court, acting for the State, in declining, in the case at bar, to pass upon the question of whether or not the law had been complied with in the procedure, and declining, among other things, to decide whether or not the plaintiffs had been given, and whether or not it was necessary, under the 14th Amendment, to give them any notice of the time and place when and where they might be heard concerning said assessment, authorized the taking, and in fact took, the property of the plaintiffs without due process of law in violation of the 14th Amendment of the Federal Constitution, notwithstanding the facts as found by the trial court showed the law had not been complied with and the plaintiffs had been afforded no notice or opportunity to defend.

Respectfully submitted,

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Attorney for Plaintiffs in Error.

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LONDONER v. CITY AND COUNTY OF DENVER.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

No. 157. Argued March 6, 9, 1908.—Decided June 1, 1908.

The legislature of a State may authorize municipal improvements without any petition of landowners to be assessed therefor, and proceedings of a municipality in accordance with charter provisions and without hearings authorizing an improvement do not deny due process of law to landowners who are afforded a hearing upon the assessment itself.

The decision of a state court that a city council properly determined that the board of public works had acted within its jurisdiction under the city charter does not involve a Federal question reviewable by this court.

Where the state court has construed a state statute so as to bring it into harmony with the Federal and state constitutions, nothing in the Fourteenth Amendment gives this court power to review the decision on the ground that the state court exercised legislative power in construing the statute in that manner and thereby violated that Amendment.

There are few constitutional restrictions on the power of the States to assess, apportion and collect taxes, and in the enforcement of such restrictions this court has regard to substance and not form, but where the legislature commits the determination of the tax to a subordinate body, due process of law requires that the taxpayer be afforded a hearing of which he must have notice, and this requirement is not satisfied by the mere right to file objections; and where, as in Colorado, the taxpayer has no right to object to an assessment in court, due process of law as guaranteed by the Fourteenth Amendment requires that he have the opportunity to support his objections by argument and proof at some time and place.

The denial of due process of law by municipal authorities while acting as a board of equalization amounts to a denial by the State.

33 Colorado, 104, reversed.

THE facts are stated in the opinion.

Mr. Joshua Freeman Grozier for plaintiffs in error.

Mr. F. W. Sanborn and *Mr. Halsted L. Ritter*, with whom *Mr. Henry A. Lindsley* was on the brief, for defendants in error.

MR. JUSTICE MOODY delivered the opinion of the court.

The plaintiffs in error began this proceeding in a state court of Colorado to relieve lands owned by them from an assessment of a tax for the cost of paving a street upon which the lands abutted. The relief sought was granted by the trial court, but its action was reversed by the Supreme Court of the State, which ordered judgment for the defendants. 33 Colorado, 104. The case is here on writ of error. The Supreme Court held that the tax was assessed in conformity with the constitution and laws of the State, and its decision on that question is conclusive.

The assignments of error relied upon are as follows:

"First. The Supreme Court of Colorado erred in holding and deciding that the portion of proviso 'eighth' of section 3 of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado, April 3, 1893' (commonly called the Denver City Charter of 1893), which provided, 'And the finding of the city council by ordinance that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal,' as construed by the Supreme Court of Colorado, was valid and conclusive as against these appellees. The validity of so much of said section as is above quoted was drawn in question and denied by appellees in said cause, on the ground of its being repugnant to the due process of law clause of the Fourteenth Amendment of the Constitution of the United States and in contravention thereof.

"Second. The Supreme Court of Colorado further erred in assuming that said city council ever made a finding by ordinance in accordance with said proviso 'eighth.'

* * * * * * * *

"Fifth. The Supreme Court of Colorado more particularly erred in holding and deciding that the city authorities, in fol-

lowing the procedure in this Eighth Avenue Paving District, No. 1, of the city of Denver, Colorado, in the manner in which the record, evidence and decree of the trial court affirmatively shows that they did, constituted due process of law as to these several appellees (now plaintiffs in error) as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

"Ninth. The Supreme Court of Colorado erred in upholding sections 29, 30, and 31, and each thereof of article 7 of 'An Act to Revise and Amend the Charter of the City of Denver, Colorado, signed and approved by the Governor of Colorado April 3rd, 1893' (commonly called the Denver City Charter of 1893), and not holding it special legislation and a denial of the equal protection of the laws and taking of liberty and property of these several plaintiffs in error without due process of law, in violation of both the state and Federal Constitution and the Fourteenth Amendment thereof.

"Tenth. The Supreme Court of Colorado erred in upholding each of the several assessments against the corner lots, and particularly those lots belonging to said Wolfe Londoner and Dennis Sheedy, because each thereof was assessed for the paving and other improvements in this district alone for more than the several lots so assessed were ever actually worth and far in excess of any special benefits received from the alleged improvements."

These assignments will be passed upon in the order in which they seem to arise in the consideration of the whole case.

The tax complained of was assessed under the provisions of the charter of the city of Denver, which confers upon the city the power to make local improvements and to assess the cost upon property specially benefited. It does not seem necessary to set forth fully the elaborate provisions of the charter regulating the exercise of this power, except where they call for special examination. The board of public works, upon the petition of a majority of the owners of the frontage to be assessed, may order the paving of a street. The board must, however, first adopt specifications, mark out a district of assess-

ment, cause a map to be made and an estimate of the cost, with the approximate amount to be assessed upon each lot of land. Before action notice by publication and an opportunity to be heard to any person interested must be given by the board.

The board may then order the improvement, but must recommend to the city council a form of ordinance authorizing it, and establishing an assessment district, which is not amendable by the council. The council may then, in its discretion, pass or refuse to pass the ordinance. If the ordinance is passed, the contract for the work is made by the mayor. The charter provides that "the finding of the city council, by ordinance, that any improvements provided for in this article were duly ordered after notice duly given, or that a petition or remonstrance was or was not filed as above provided, or was or was not subscribed by the required number of owners aforesaid shall be conclusive in every court or other tribunal." The charter then provides for the assessment of the cost in the following sections:

"SEC. 29. Upon completion of any local improvement, or, in the case of sewers, upon completion from time to time of any part or parts thereof, affording complete drainage for any part or parts of the district and acceptance thereof by the board of public works, or whenever the total cost of any such improvement, or of any such part or parts of any sewer, can be definitely ascertained, the board of public works shall prepare a statement therein showing the whole cost of the improvement, or such parts thereof, including six per cent additional for costs of collection and other incidentals, and interest to the next succeeding date upon which general taxes, or the first installment thereof, are by the laws of this State made payable; and apportioning the same upon each lot or tract of land to be assessed for the same, as hereinabove provided; and shall cause the same to be certified by the president and filed in the office of the city clerk.

"SEC. 30. The city clerk shall thereupon, by advertisement for ten days in some newspaper of general circulation, published

in the city of Denver, notify the owners of the real estate to be assessed that said improvements have been, or are about to be, completed and accepted, therein specifying the whole cost of the improvements and the share so apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing, by the owners, to the city council and filed with the city clerk within thirty days from the first publication of such notice, will be heard and determined by the city council before the passage of any ordinance assessing the cost of said improvements.

"SEC. 31. After the period specified in said notice the city council, sitting as a board of equalization, shall hear and determine all such complaints and objections, and may recommend to the board of public works any modification of the apportionments made by said board; the board may thereupon make such modifications and changes as to them may seem equitable and just, or may confirm the first apportionment, and shall notify the city council of their final decision; and the city council shall thereupon by ordinance assess the cost of said improvements against all the real estate in said district respectively in the proportions above mentioned."

It appears from the charter that, in the execution of the power to make local improvements and assess the cost upon the property specially benefited, the main steps to be taken by the city authorities are plainly marked and separated: 1. The board of public works must transmit to the city council a resolution ordering the work to be done and the form of an ordinance authorizing it and creating an assessment district. This it can do only upon certain conditions, one of which is that there shall first be filed a petition asking the improvement, signed by the owners of the majority of the frontage to be assessed. 2. The passage of that ordinance by the city council, which is given authority to determine conclusively whether the action of the board was duly taken. 3. The assessment of the cost upon the landowners after due notice and opportunity for hearing.

In the case before us the board took the first step by transmitting to the council the resolution to do the work and the form of an ordinance authorizing it. It is contended, however, that there was wanting an essential condition of the jurisdiction of the board, namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council the authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed. That ordinance, after reciting a compliance by the board with the charter in other respects, and that "certain petitions for said improvements were first presented to the said board, subscribed by the owners of a majority of the frontage to be assessed for said improvements as by the city charter required," enacted "That upon consideration of the premises the city council doth find that in their action and proceedings in relation to said Eighth Avenue Paving District Number One the said board of public works has fully complied with the requirements of the city charter relating thereto." The state Supreme Court held that the determination of the city council was conclusive that a proper petition was filed, and that decision must be accepted by us as the law of the State. The only question for this court is whether the charter provision authorizing such a finding, without notice to the landowners, denies to them due process of law. We think it does not. The proceedings, from the beginning up to and including the passage of the ordinance authorizing the work did not include any assessment or necessitate any assessment, although they laid the foundation for an assessment, which might or might not subsequently be made. Clearly all this might validly be done without hearing to the landowners, provided a hearing upon the assessment itself is afforded. *Voigt* v. *Detroit*, 184 U. S. 115; *Goodrich* v. *Detroit*, 184 U. S. 432. The

legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action it could, so far as the Federal Constitution is concerned, accompany that condition with a provision that the council, with or without notice, should determine finally whether it had been performed. This disposes of the first assignment of error, which is overruled. The second assignment is that the court erred in deciding that the city council had determined that the board of public works had complied with the conditions of its jurisdiction to order the work done. It is enough to say that this is not a Federal question.

We see nothing in the sixth assignment of error. It is apparently based upon the proposition that, in construing a law of the State in a manner which the plaintiffs in error think was clearly erroneous, the Supreme Court of the State exercised legislative power, and thereby violated the Fourteenth Amendment. We are puzzled to find any other answer to this proposition than to say that it is founded upon a misconception of the opinion of the court and of the effect of the Fourteenth Amendment. The complaint in this assignment is not that the court gave a construction to the law which brought it into conflict with the Federal Constitution, but that, in construing the law so as to bring it into harmony with the Federal and state constitutions, the court so far neglected its obvious meaning as to make the judgment an exercise of legislative power. We know of nothing in the Fourteenth Amendment which gives us authority to consider a question of this kind. We think it fitting, however, to say that we see nothing extraordinary in the method of interpretation followed by the court, or in its results. Whether we should or not have arrived at the same conclusions is not of consequence.

The ninth assignment questions the constitutionality of that part of the law which authorizes the assessment of benefits. It seems desirable, for the proper disposition of this and the next assignment, to state the construction which the Supreme

Court gave to the charter. This may be found in the judgment under review and two cases decided with it. *Denver* v. *Kennedy*, 33 Colorado, 80; *Denver* v. *Dumars*, 33 Colorado, 94. From these cases it appears that the lien upon the adjoining land arises out of the assessment; after the cost of the work and the provisional apportionment is certified to the city council the landowners affected are afforded an opportunity to be heard upon the validity and amount of the assessment by the council sitting as a board of equalization; if any further notice than the notice to file complaints and objections is required, the city authorities have the implied power to give it; the hearing must be before the assessment is made; this hearing, provided for by § 31, is one where the board of equalization "shall hear the parties complaining and such testimony as they may offer in support of their complaints and objections as would be competent and relevant," 33 Colorado, 97; and that the full hearing before the board of equalization excludes the courts from entertaining any objections which are cognizable by this board. The statute itself therefore is clear of all constitutional faults. It remains to see how it was administered in the case at bar.

The fifth assignment, though general, vague and obscure, fairly raises, we think, the question whether the assessment was made without notice and opportunity for hearing to those affected by it, thereby denying to them due process of law. The trial court found as a fact that no opportunity for hearing was afforded, and the Supreme Court did not disturb this finding. The record discloses what was actually done, and there seems to be no dispute about it. After the improvement was completed the board of public works, in compliance with § 29 of the charter, certified to the city clerk a statement of the cost, and an apportionment of it to the lots of land to be assessed. Thereupon the city clerk, in compliance with § 30, published a notice stating, *inter alia*, that the written complaints or objections of the owners, if filed within thirty days, would be "heard and determined by the city council before the pas-

sage of any ordinance assessing the cost." Those interested, therefore, were informed that if they reduced their complaints and objections to writing, and filed them within thirty days, those complaints and objections would be heard, and would be heard before any assessment was made. The notice given in this case, although following the words of the statute, did not fix the time for hearing, and apparently there were no stated sittings of the council acting as a board of equalization. But the notice purported only to fix the time for filing the complaints and objections, and to inform those who should file them that they would be heard before action. The statute expressly required no other notice, but it was sustained in the court below on the authority of *Paulsen* v. *Portland*, 149 U. S. 30, because there was an implied power in the city council to give notice of the time for hearing. We think that the court rightly conceived the meaning of that case and that the statute could be sustained only upon the theory drawn from it. Resting upon the assurance that they would be heard, the plaintiffs in error filed within the thirty days the following paper:

"Denver, Colorado, January 13, 1900.

"To the Honorable Board of Public Works and the Honorable Mayor and City Council of the City of Denver:

"The undersigned, by Joshua Grozier, their attorney, do hereby most earnestly and strenuously protest and object to the passage of the contemplated or any assessing ordinance against the property in Eighth Avenue Paving District No. 1, so called, for each of the following reasons, to wit:

"1st. That said assessment and all and each of the proceedings leading up to the same were and are illegal, voidable and void, and the attempted assessment if made will be void and uncollectible.

"2nd. That said assessment and the cost of said pretended improvement should be collected, if at all, as a general tax against the city at large and not as a special assessment.

"3d. That property in said city not assessed is benefited by the said pretended improvement and certain property assessed is not benefited by said pretended improvement and other property assessed is not benefited by said pretended improvement to the extent of the assessment; that the individual pieces of property in said district are not benefited to the extent assessed against them and each of them respectively; that the assessment is abitrary and property assessed in an equal amount is not benefited equally; that the boundaries of said pretended district were arbitrarily created without regard to the benefits or any other method of assessment known to law; that said assessment is outrageously large.

"4th. That each of the laws and each section thereof under which the proceedings in said pretended district were attempted to be had do not confer the authority for such proceedings; that the 1893 city charter was not properly passed and is not a law of the State of Colorado by reason of not properly or at all passing the legislature; that each of the provisions of said charter under which said proceedings were attempted are unconstitutional and violative of fundamental principles of law, the Constitution of the United States and the state constitution, or some one or more of the provisions of one or more of the same.

"5th. Because the pretended notice of assessment is invalid and was not published in accordance with the law, and is in fact no notice at all; because there was and is no valid ordinance creating said district; because each notice required by the 1893 city charter to be given, where it was attempted to give such notice, was insufficient, and was not properly given or properly published.

"6th. Because of non-compliance by the contractor with his contract and failure to complete the work in accordance with the contract; because the contract for said work was let without right or authority; because said pretended district is incomplete and the work under said contract has not been completed in accordance with said contract; because items too

numerous to mention, which were not a proper charge in the said assessment, are included therein.

"7th. Because the work was done under pretended grants of authority contained in pretended laws, which laws were violative of the constitution and fundamental laws of the State and Union.

"8th. Because the city had no jurisdiction in the premises. No petition subscribed by the owners of a majority of the frontage in the district to be assessed for said improvements was ever obtained or presented.

"9th. Because of delay by the board of public works in attempting to let the contract and because the said pretended improvement was never properly nor sufficiently petitioned for; because the contracts were not let nor the work done in accordance with the petitions, if any, for the work, and because the city had no jurisdiction in the premises.

"10th. Because before ordering the pretended improvement full details and specifications for the same, permitting and encouraging competition and determining the number of installments and time within which the costs shall be payable, the rate of interest on unpaid installments, and the district of lands to be assessed, together with a map showing the approximate amounts to be assessed, were not adopted by the board of public works before the letting of the contract for the work and furnishing of material; because advertisement for 20 days in two daily newspapers of general circulation, giving notice to the owners of real estate in the district of the kind of improvements proposed, the number of installments and time in which payable, rate of interest and extent of the district, probable cost and time when a resolution ordering the improvement would be considered, was not made either properly or at all, and if ever attempted to be made was not made according to law or as required by the law or charter.

"11th. Because the attempted advertisement for bids on the contract attempted to be let were not properly published and were published and let, and the proceedings had, if at all,

in such a way as to be prejudicial to the competition of bidders and to deter bidders; and the completion of the contracts after being attempted to be let was permitted to lag in such a manner as not to comply with the contract, charter or laws, and the power to let the contract attempted to be let was not within the power of the parties attempting to let the same; because the city council is or was by some of the proceedings deprived of legislative discretion, and the board of public works and other pretended bodies given such discretion, which discretion they delegated to others having no right or power to exercise the same; and executive functions were conferred on bodies having no right, power or authority to exercise the same and taken away from others to whom such power was attempted to be granted or given or who should properly exercise the same; that judicial power was attempted to be conferred on the board of public works, so called, and the city council, and other bodies or pretended bodies not judicial or *quasi*-judicial in character, having no right, power or authority to exercise the same, and the courts attempted to be deprived thereof.

"Wherefore, because of the foregoing and numerous other good and sufficient reasons, the undersigned object and protest against the passage of the said proposed assessing ordinance."

This certainly was a complaint against and objection to the proposed assessment. Instead of affording the plaintiffs in error an opportunity to be heard upon its allegations, the city council, without notice to them, met as a board of equalization, not in a stated but in a specially called session, and, without any hearing, adopted the following resolution:

"Whereas, complaints have been filed by the various persons and firms as the owners of real estate included within the Eighth Avenue Paving District No. 1, of the city of Denver against the proposed assessments on said property for the cost of said paving, the names and description of the real estate respectively owned by such persons being more particularly described in the various complaints filed with the city clerk; and

"Whereas, no complaint or objection has been filed or made

against the apportionment of said assessment made by the board of public works of the city of Denver, but the complaints and objections filed deny wholly the right of the city to assess any district or portion of the assessable property of the city of Denver; therefore, be it

"Resolved, by the city council of the city of Denver, sitting as a board of equalization, that the apportionments of said assessment made by said board of public works be, and the same are hereby, confirmed and approved."

Subsequently, without further notice or hearing, the city council enacted the ordinance of assessment whose validity is to be determined in this case. The facts out of which the question on this assignment arises may be compressed into small compass. The first step in the assessment proceedings was by the certificate of the board of public works of the cost of the improvement and a preliminary apportionment of it. The last step was the enactment of the assessment ordinance. From beginning to end of the proceedings the landowners, although allowed to formulate and file complaints and objections, were not afforded an opportunity to be heard upon them. Upon these facts was there a denial by the State of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

In the assessment, apportionment and collection of taxes upon property within their jurisdiction the Constitution of the United States imposes few restrictions upon the States. In the enforcement of such restrictions as the Constitution does impose this court has regarded substance and not form. But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place

of the hearing. *Hager* v. *Reclamation District*, 111 U. S. 701; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona & St. Peter Land Co.* v. *Minnesota*, 159 U. S. 526, 537; *Lent* v. *Tillson*, 140 U. S. 316; *Glidden* v. *Harrington*, 189 U. S. 255; *Hibben* v. *Smith*, 191 U. S. 310; *Security Trust Co.* v. *Lexington*, 203 U. S. 323; *Central of Georgia* v. *Wright*, 207 U. S. 127. It must be remembered that the law of Colorado denies the landowner the right to object in the courts to the assessment, upon the ground that the objections are cognizable only by the board of equalization.

If it is enough that, under such circumstances, an opportunity is given to submit in writing all objections to and complaints of the tax to the board, then there was a hearing afforded in the case at bar. But we think that something more than that, even in proceedings for taxation, is required by due process of law. Many requirements essential in strictly judicial proceedings may be dispensed with in proceedings of this nature. But even here a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief, and, if need be, by proof, however informal. *Pittsburg &c. Railway Co.* v. *Backus*, 154 U. S. 421, 426; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112, 171, *et seq.* It is apparent that such a hearing was denied to the plaintiffs in error. The denial was by the city council, which, while acting as a board of equalization, represents the State. *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20. The assessment was therefore void, and the plaintiffs in error were entitled to a decree discharging their lands from a lien on account of it. It is not now necessary to consider the tenth assignment of error.

Judgment reversed.

THE CHIEF JUSTICE and MR. JUSTICE HOLMES dissent.